[redacted]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 600.

FRANK W. DARLING, PLAINTIFF IN ERROR,

vs.

CITY OF NEWPORT NEWS.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

[redacted]

(26,454)

(26,686)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 30, 1918.

a To the Honorable Stafford G. Whittle, President (and Chief Justice) of the Supreme Court of Appeals of Virginia:

And now comes Frank W. Darling, appellant, and represents that on the 13th day of June, 1918, a final judgment was duly entered by the Supreme Court of Appeals of Virginia, affirming the decree entered by the Circuit Court for the City of Newport News, Virginia, in a suit in equity wherein Frank W. Darling was plaintiff, and the City of Newport News, a municipal corporation, was defendant, and awarding costs in favor of the said City of Newport News.

That this was a suit praying for an injunction against the said City of Newport News, restraining it from polluting the oyster beds and oysters planted thereon, of appellant, located on the North side of the body of water known as Hampton Roads, Elizabeth City County, Virginia, which pollution was caused by a discharge of sewage of said City over, above and upon the said oyster planting ground and oysters. The bill likewise prayed for damages against the said City on account of the planting ground and oysters already destroyed by the discharge of said sewage by appellee. Said oyster planting ground consists of eighteen hundred acres, upon which were planted approximately four hundred thousand bushels of oysters, the investment approximating the sum of Three Hundred Thousand Dollars ($300,000.00).

A demurrer was interposed to said bill by the City of Newport News, which demurrer was sustained by the Circuit Court of said City and its decree affirmed by the Supreme Court of Appeals as aforesaid. The sundry grounds of the demurrer are set out in the record, to which reference is made, but the ground on which the Supreme Court of Appeals based its conclusion was that appellant took the lease of his oyster planting ground subject to the right of the Legislature of Virginia afterwards to grant the City of b Newport News the right to discharge its sewage thereon, and cause the injuries complained of.

The leases were made to appellant in the years 1884 and 1885. The City of Newport News was incorporated in the year 1896, and in the year 1907, pursuant to the authority granted by the Act of the Legislature of Virginia creating said corporation, constructed the system of sewers, the sewage from which caused the injuries set out in the bill. The bill alleges that one hundred acres of said ground had already been polluted and condemned both by the State and United States authorities, and that the balance of appellant's oyster planting ground and oysters would soon be polluted if an injunction was not granted.

The bill further alleged that while the sewer system was established in 1907, it was only a short time before the filing of the bill that the laying of additional sewers, necessitated by the increase in population of the City of Newport News and the consequent increase of sewage, caused the contamination complained of. Appellant then promptly asserted his right to relief by the bill in equity.

Your petitioner avers that in his said bill of complaint, and also in his petition for appeal and assignments of error therein made and argued before the Supreme Court of Appeals of Virginia, he expressly charged that the Act of the Legislature of Virginia (Acts of 1895-96, page 74), in so far as it authorized the construction of the sewer system aforesaid and the discharge of sewage over and on his oyster planting ground and oysters, was in violation of the Constitution of the United States, and especially the provisions of Article 1, Section 10, and the Fourteenth Amendment to the said Constitution. The protection of the Constitution of the United States, and especially the provisions aforesaid, were expressly invoked by your petitioner. Notwithstanding these facts, the Supreme Court of Appeals of Virginia decided against the claim and contention thus specially set up and claimed by petitioner. And petitioner shows that the said judgment and decision and interpretation of said Act of the Legislature of Virginia were and are repugnant to the said United States Constitution, and especially the provisions aforesaid.

Your petitioner further avers that in the aforesaid judgment and proceedings certain errors were committed to the prejudice of your petitioner, all of which will more fully appear from the assignment of errors, which is filed herewith.

Wherefore, your petitioner prays that a writ of error from the Supreme Court of the United States may issue in this case to the Supreme Court of Appeals of Virginia for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated by the Clerk of the Supreme Court of Appeals of Virginia, may be sent to the Supreme Court of the United States as provided by law.

Dated this 23rd day of July, 1918.

JONES & WOODWARD,
J. WINSTON READ,
Attorneys for Petitioner and Plaintiff in Error.

[Endorsed:] Supreme Court of United States. Frank W. Darling vs. City of Newport News. Error to the Supreme Court of Appeals of Virginia. Petition for Writ of Error. Jones & Woodward, Attorneys-at-Law, Newport News, Va.

In the Supreme Court of the United States.

FRANK W. DARLING
vs.
CITY OF NEWPORT NEWS.

Error to the Supreme Court of Appeals of Virginia.

Assignment of Errors.

And now comes Frank W. Darling, petitioner and plaintiff in error, by Jones & Woodward and J. Winston Read, his attorneys,

and in connection with his petition for a writ of error, shows that, in the record and proceedings and in the rendering of the judgment and decision of the Supreme Court of Appeals of Virginia in the above entitled cause, manifest error has intervened to the prejudice of this petitioner and plaintiff in error in this, to-wit:

First. The Court erred in holding that the taking and damaging of petitioner's oysters and oyster planting ground and depriving him of the use thereof, and in construing the Act of the Legislature of Virginia, approved January 16, 1896, granting a charter to the City of Newport News and authorizing the construction of the sewer system, which caused the injuries complained of, to so take and damage the petitioner's said property and deprive him of the use thereof, was not in violation of Article 1, Section 10, of the Constitution of the United States.

Second. The Court erred in holding that the taking and damaging of petitioner's oysters and oyster planting ground and depriving him of the use thereof, and in construing the Act of the Legislature of Virginia, approved January 16, 1896, granting a charter to the
f City of Newport News and authorizing the construction of the sewer system, which caused the injuries complained of, to so take and damage the petitioner's said property and deprive him of the use thereof, was not in violation of the Fourteenth Amendment of the Constitution of the United States.

Third. The Court erred in holding that the Act of the Legislature of Virginia, approved January 16, 1896, granting a charter to the City of Newport News and authorizing the construction of the sewer system which caused the injuries complained of, as administered and justified by the said Court, was not in violation of Article 1, Section 10, of the Constitution of the United States, as impairing the obligation of the contract existing between the petitioner and the State of Virginia by virtue of the leases of the said oyster planting grounds from the State of Virginia by petitioner in the years 1884 and 1885.

Fourth. The Court erred in holding that the Act of the Legislature of Virginia, approved January 16, 1896, granting a charter to the City of Newport News and authorizing the construction of the sewer system which caused the injuries complained of, as administered and justified by the said Court, was not in violation of the Fourteenth Amendment to the Constitution of the United States.

By reason whereof, this petitioner and plaintiff in error prays that the said judgment of the Supreme Court of Appeals of Virginia may be reversed, etc.

Dated this 23rd day of July, 1918.

JONES & WOODWARD,
J. WINSTON READ,
Attorneys for Petitioner and Plaintiff in Error.

g [Endorsed:] In the Supreme Court of the United States. Frank W. Darling vs. City of Newport News. Error to the Supreme Court of Appeals of Virginia. Assignment of Errors. Jones & Woodward, Attorneys-at-Law, Newport News, Va.

h In the Supreme Court of the United States.

FRANK W. DARLING

vs.

CITY OF NEWPORT NEWS.

Order Allowing Writ of Error.

Upon reading the petition of Frank W. Darling for writ of error and the assignment of errors, and upon due consideration of the record of said cause;

It is ordered, that a writ of error be allowed from the Supreme Court of the United States to the Supreme Court of Appeals of Virginia, as prayed for in said petition, and that said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law, upon condition that the said petitioner and plaintiff in error give security in the sum of One Thousand Dollars ($1,000.00), that the said plaintiff in error shall prosecute said writ of error to effect and, if said plaintiff in error fail to make his plea good, shall answer to the defendant in error for all costs and damages that may be adjudged or decreed on account of said writ of error.

And the said plaintiff in error now presenting a bond in the sum of One Thousand Dollars ($1,000.00), with the National Surety Company, of New York, a corporation, as surety, it is ordered that same be and hereby is duly approved.

In witness whereof, I have hereunto set my hand this 25 day of July, 1918.

STAFFORD G. WHITTLE,
President and Chief Justice of the Supreme Court of Appeals of Virginia.

i A Copy.

Know all men by these presents, that Frank W. Darling, as principal, and National Surety Company, of New York, a corporation, as surety, are held and firmly bound unto the City of Newport News, a municipal corporation, in the sum of One Thousand Dollars ($1,000.00), to be paid to the said City of Newport News, to which payment well and truly to be made we bind ourselves jointly and severally by these presents.

Sealed with our seals and dated this 23rd day of July, 1918.

(Signed) FRANK W. DARLING. [SEAL.]
" NATIONAL SURETY COMPANY,
By R. M. LETT, [SEAL.]
W. McPOWELL,
Attys. in Fact.

Whereas, the above named plaintiff in error, Frank W. Darling, has sued out a writ of error from the United States Supreme Court to the Supreme Court of Appeals of Virginia, to reverse the judgment of the Supreme Court of Appeals of Virginia, rendered on the 13th day of June, 1918, in the suit of Frank W. Darling vs. City of Newport News, a municipal corporation.

Now, therefore, the condition of this obligation is such that, if the above named plaintiff in error shall prosecute his said writ of error to effect and answer all costs and damages that may be adjudged, if he shall fail to make good his plea, then this obligation is to be void; otherwise to remain in full force and effect.

(Signed) FRANK W. DARLING, [SEAL.]
By R. M. LETT,
W. McPOWELL,
Attorneys in Fact.

Approved this 25 day of July, 1918.

(Signed) STAFFORD G. WHITTLE,
President and Chief Justice of the Supreme Court of Appeals of Virginia.

[Endorsed:] Darling v. City of Newport News. The original of the within bond received & filed July 25, 1918. H. Stewart Jones, Clerk.

j THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of Appeals of the State of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of Appeals of the State of Virginia, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit of Frank W. Darling, Plaintiff in Error, and City of Newport News, Defendant in Error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Frank W. Darling, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to

the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things
k concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 23rd day of August, 1918, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the said Supreme Court, the 25th day of July, in the year of our Lord one thousand nine hundred and eighteen.

[Seal United States District Court, Eastern District of Virginia.]

JOSEPH P. BRADY,
Clerk United States District Court.

Allowed by
STAFFORD G. WHITTLE,
President Supreme Court
of Appeals of Virginia.

l THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to City of Newport —, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of Appeals of the State of Virginia, wherein Frank W. Darling is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment or decree entered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the President of the Supreme Court of Appeals of the State of Virginia, this the 25th day of July, 1918.

STAFFORD G. WHITTLE,
President Supreme Court of Appeals
of the State of Virginia.

Attest:

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
Clerk Supreme Court of Appeals
of the State of Virginia.

Legal service accepted August 6th, 1918.

CITY OF NEWPORT NEWS,
By J. A. MASSIE,
City Attorney.

m Record 279.

FRANK W. DARLING

v.

CITY OF NEWPORT NEWS, a Municipal Corporation.

From the Circuit Court of the City of Newport News.

"The briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with Act of Assembly, approved March 16, 1903; and the clerks of this court are directed not to receive or file a brief not conforming in all respects to the aforementioned requirements."

The foregoing is printed in small pica type for the information of counsel.

H. STEWART JONES, *Clerk.*

1 In the Supreme Court of Appeals of Virginia, at Richmond.

FRANK W. DARLING

vs.

CITY OF NEWPORT NEWS, a Municipal Corporation.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, Frank W. Darling, respectfully shows unto your Honors that he is aggrieved by a final decree of the Circuit Court of the City of Newport News, Virginia, pronounced on the 27th day of September, 1916, in a chancery suit therein pending under the style of Frank W. Darling vs. City of Newport News, a municipal corporation, wherein a demurrer to the original and amended bills filed by complainant was sustained, and said bills dismissed.

A transcript of the record in said cause is filed herewith, from which it will appear that this Honorable Court has jurisdiction.

Statement.

Your petitioner, Frank W. Darling, is the lessee from the State of Virginia of Eighteen hundred (1,800) acres of oyster planting ground located in the body of water known as "Hampton Roads,"

lying to the South and Southeast of the City of Newport News. This ground constitutes a large part of what is known as "Hampton Bar," and extends from a point near the mouth of the James River to a point opposite Old Point Comfort. It is located on the North side of Hampton Roads and *c*onstitutes the largest connected area
2 of oyster planting ground in Virginia, producing a considerable percentage of the total of oysters sold by planters in this State. At the time of the institution of this suit, the number of bushels of oysters on petitioner's ground aggregated four hundred thousand (400,000), and Mr. Darling's investment approximated the sum of Three Hundred Thousand Dollars ($300,000.00). His customers are located in practically every State east of the Mississippi River.

The assignments of this oyster ground were originally made in 1884 and 1885, and petitioner has paid the annual rent thereon and otherwise complied with all oyster laws of the State of Virginia.

The City of Newport News was incorporated in the year 1896, and in the year 1900 constructed a system of permanent sewers. As originally constructed, all of the sewage was emptied into the James River on the Western side of said City. A pumping station was established in the eastern portion of said City, whereby the sewage from that section was forced into the sewers emptying into the James River as aforesaid. This plan was adopted by the authorities of said City pursuant to the advice of the engineer in charge, who had carefully gone over the situation and was of opinion that by dumping the sewage into the main channel of James River on the western side of said City, the course of the stream would carry the sewage out, past and beyond the oyster planting ground on Hampton Bar, and thence out to sea, without injury to said planting ground. The said engineer was also of opinion, and so advised the authorities of said City, that the dumping of sewage from the eastern portion of said City into Salter's Creek, which enters Hampton Roads near the said oyster planting ground, would result in contaminating and destroying the oysters thereon. Notwithstanding this warning, however, the said City, at the expiration of the summer of the year 1907, abolished the said pumping station in order to rid itself of the small expense incident to the maintenance thereof, and constructed another sewer for the eastern portion of said City, running in part through the County of Elizabeth City and emptying into Salter's Creek within the limits of said County, by means of which the sewage emptied into said Creek flows out and over petitioner's oyster planting ground, and a considerable portion thereof is deposited on the said oyster planting ground and the oysters thereby contaminated.

The City of Newport News could not only, at small expense to itself, provide outlets for all its sewage into the James River on the western side of said City, but could likewise, at a moderate
3 expense, provide a method of purification of said sewage which would render the same perfectly harmless, as is now done in a great many of the cities of the United States.

Petitioner is powerless in the premises, unless the relief prayed for in the bill is granted him. He can neither compel the City of

Newport News to provide a purification plant, nor can he compel the City to dump its sewage into the James River, save by the aid of a Court of Equity. The affirmance of the decree of the lower Court will mark the beginning of the end of the oyster planting industry in Virginia. The rapid growth of the Cities and the consequent increase of population and sewage systems will eventually destroy the oyster planting grounds. Such an industry ought not to be destroyed without the gravest necessity. The allegations of this bill not only deny the existence of such necessity but point out a simple, inexpensive and efficacious remedy, whereby such industry may be preserved.

It will be noted that while the first sewer emptying into Salter's Creek (a non-navigable stream) was laid in the year 1907, it was only a short time before the filing of this bill that the laying of additional sewers, necessitated by the increase in population of the City of Newport News and the consequent increase of sewage, caused the contamination complained of.

Petitioner then promptly asserted his right to relief by injunction. See Paragraph B of the amended bill of complaint. (Rec. pp. 16, 17.)

Counsel for petitioner will content themselves with this brief statement, and refer to other allegations of the bill in the discussion of the sundry grounds of demurrer.

Assignment of Error.

The Court erred in sustaining the demurrer and dismissing the original and amended bills of complaint.

The grounds of demurrer were set out in writing, as required by order of Court. Quite a number of such grounds seem to be repetitions and to interpose the same defenses in different language.

The first and second grounds of the demurrer declare, (*a*) that the tidal and salt navigable waters of Hampton Roads and the soil beneath are owned and held by the Commonwealth, in trust for all the people of the Commonwealth, and cannot be granted, aliened, leased, devised or conveyed contrary to, against or to the detriment of the public use thereof, and (*b*) that the oys-er land in the bill set out, and the waters above the same, are owned and held by the Commonwealth in trust for all the people and cannot be leased to the petitioner against or in conflict with the interest of the public therein or thereto. (Rec. p. 21.) These two grounds of the demurrer will be considered together.

4

It has long been the policy of the State of Virginia to foster the oyster industry of the State. Section 2137 of the Code of Virginia of 1904 provides for the leasing and renting of the oyster grounds other than the natural rocks or beds, and Section 2137-A of the said Code provides among other things, that when the rent and the costs have been paid in advance, "then so long as the rent is paid annually in advance, the State will guarantee the absolute right to the renter

to continue to use and occupy the same for the period of twenty years the renter acquired." And the law further provides that "should any lessee of oyster planting grounds or bathing grounds have his grounds or any part thereof re-surveyed or re-assigned, such re-survey or re-assignment of the ground shall be deemed to be a continuance of the original assignment, subject to all the limitations and conditions under which such grounds were originally assigned." Acts of Assembly for 1910, page 547, Sec. 9. Section 2531 of the said Code declares that "the interest in said planting grounds shall be construed to be a chattel real, and shall at the death of the renter pass into the hands of his personal representative for the benefit of the creditors and heirs of the decedent, etc."

The rights of the renters of oyster planting grounds have frequently come under the review of this Court.

As far back as 1875, this Court, in the case of Power and Kellogg v. Tazewell, 66 Va. (25 Gratt.) 786, Judge Anderson, speaking for the Court, on page 791, declared: "The design and object of this Statute is to give exclusive right to the licensee or lessee to use and occupy the land, for a period of one year, for his benefit, for a consideration payable to the State, the proprietor. It confers in fact an exclusive right to use, occupy or take the profits of land, by planting or sowing oysters upon it, which grow and fatten upon the soil and the salt water, and increase in value, I am informed, from seventy-five to one hundred per cent. Such permission may be sometimes called a license. It is more in the nature of a lease." 1 Wash. on Real Property, 3rd Ed., p. 543, and cases cited.

"Licenses which in their nature amount to the granting of an estate for ever so short a time, are not good without deed
5 (a lease for one year without writing is good by our Statute), and are considered as lesses and must always be pleaded as such. If a man license me to enter into his land and to occupy it for a year, half a year or such like, this is a lease and so shall be pleaded."

Since the decision of that case, many cases have come before this Court involving the right of renters to the bottoms leased from the State, and the Court has uniformly upheld the rights of the lessees.

Hurst v. Delaney, 84 Va. 701;
West v. Adams, 2 Va. Dec. 517 (27th S. E. 496);
Coleman v. Claytor, 93 Va. 20;
Boggs et als. v. Commonwealth, 76 Va. 994-5;
McCandlish v. Commonwealth, 76 Va. 1002;
Taylor v. Commonwealth, 102 Va. 759;

See also: Illinois Central Ry. Co. v. Illinois, 146 U. S. 387, 36 L. Ed. 1018.

The third ground of demurrer seems to assume that the City of Newport News being a municipal corporation, has the right to damage or destroy petitioner's property in the manner stated in the bill.

A municipal corporation has no more power than an individual to take or damage private property, without compensation.

1 Farnham on Waters, Sec. 138*b*, 138*c*, 138*d*;
Gould on Waters, Sections 545-546;
Joyce on Nuisances, Sec. 284;
Attorney-General v. Birmingham, 4 K. & J. 528;
London County Council v. Price's Candle Co., 75 J. P. 329, 9 L. R. A. 660;
Platt Brothers & Company v. Waterbury, 72 Conn. 531, 48 L. R. A. 691;
Huffmire v. Brooklyn, 162 N. Y. 584, 48 L. R. A. 421;
McLaughlin v. Hope (Ark.), 47 L. R. A. (N. S.) 137.

The great weight of authority, American and English, supports the view that legislative authority to install a sewer system carries no implication of authority to create and maintain a nuisance; and that it matters not whether such nuisance results from negligence, or from the plan adopted. If such a nuisance be created, the same remedies may be invoked as if the perpetrator were an individual.

Winchell v. Waukesha, 110 Wis. 101, 85 N. W. 668.

6 As said in an Illinois case, it may be true that a City is liable to be compelled to afford sufficient drainage for health and comfort of the people, but that would not authorize it so to construct the work as to destroy or seriously impair the value of the property of an individual. If there is no means of making proper drainage without injury to individuals, let the community for whose benefit it is constructed, through their corporate government, by condemnation or otherwise, make compensation. Every principle of justice, and the dictates of reason, would say that it is wholly wrong to impose the burden of the nuisance on one or a few citizens. Jacksonville v. Lambert, 62 Ill. 519.

As to the fourth and fifth grounds of demurrer, we do not deem it essential to the relief prayed for in the bill that the allegations set out in these grounds of demurrer should be recited therein, and, therefore, will not discuss the same.

The sixth ground of demurrer alleges that the City was acting within its rights, powers and duties, in constructing an outlet for its sewer beyond the City limits.

The alleged authority to construct the sewers in controversy is contained in Section 29 of the Charter of the City of Newport News (Act of January 16, 1896), wherein the following power, amongst others, is enumerated: "To build or acquire sewers within the said City."

In paragraph "C" of the bill of complaint, it is alleged that the sewers in question were constructed in the years 1900 and 1907, respectively, and that the main sewer for the Eastern portion of said City was constructed in part through the County of Elizabeth City, and empties into Salter's Creek; that it was wholly unnecessary to lay this sewer in the County of Elizabeth City, and that it was

entirely practicable to construct the sewer system so that it would not injure the property of petitioner.

A City has no right to build sewers outside its limits, unless so authorized by its charter. A few cases modify this doctrine to the extent of permitting the extension of sewers beyond the city limits, where absolutely necessary.

28 Cyc. 917.

The Legislature, recognizing this fact ,amended the general law in 1908 so as to permit this.

Acts 1908, p. 623.

7 The above statute is not retrospective. Its language not only imports the contrary, but the law is well settled that no statute will be construed so as to give it retrospective operation unless there is something on its face to indicate beyond a doubt that such was the purpose of the Legislature.

Black on Interpretation of Laws, p. 251;
Merchant's Bank v. Ballou, 98 Va. 112.

The seventh ground of demurrer is without merit. The object of this bill is to prevent by injunction the destruction of petitioner's property and to recover damages for the injury already sustained. And if the act complained of was done without legislative authority, it is proper in this case to show such fact. And the City cannot escape liability merely because it exceeded its powers.

Richmond v. Smith, 101 Va. 161.

The eighth ground of demurrer is as follows: "There is no allegation of defective construction or careless and negligent maintenance and operation of its sewer system, but the sole complaint is in the selection of the plan of its sewerage system, in which the City acts in a legislative or quasi judicial capacity, which acts are not reviewable by the Courts."

In paragraph "C" of the bill, it is alleged that prior to the construction of these sewers, the Civil Engineer in charge of the work made an examination of the waters of Hampton Roads at and near the mouth of Salter's Creek, with a view of ascertaining whether the dumping of sewage into said Creek would result in injury to the oyster planting grounds of complainant and other oyster planters and reached the conclusion that the destruction of these oysters and oyster beds would follow as a necessary result; that it was entirely practicable to have the outlet of these sewers in James River on the west side of said City, which course would save the oysters from pollution. This Civil Engineer advised the City authorities of the conclusions he had reached. His advice was followed, and the outlet of the sewers placed in James River as aforesaid. But several years afterwards, in order to save a trifling expense incident to the maintenance of a pumping station in the eastern portion of the City, another sewer was laid from said eastern portion to Salter's Creek,

and running in part through the County of Elizabeth City. At the time the said sewer was laid, the City authorities had full knowledge that the necessary result of the construction of said sewer
8 would be the pollution of complainant's oysters and oyster beds.

With these facts admitted, as they must be by the demurrer interposed in this case, the law seems to be settled in favor of the complainant.

Chalkley v. City of Richmond, 88 Va. 402, 407 and authorities there cited.

In Dillon on Municipal Corporations, Sec. 1047, it is said: "Courts of the highest respectability have held that if the sewer, whatever its plan, is so constructed as to cause a positive and direct invasion of plaintiff's private property, as by collecting and throwing upon it, to his damage, water which would not otherwise have flowed or found its way there, the corporation is liable. This exception to the general doctrine, when properly limited and applied, seems to be founded on sound principles." See also Ashley v. Port Huron, 35 Mich. 300, opinion by Chief Justice Cooley.

The construction of sewers is not a government or public function. The system when constructed, is the property of the City, and the general public of the state at large, have no interest therein.

28 Cyc. 917;
City of Detroit v. Corey (Mich.), 80 Am. Dec. 78.

In the case last cited, it is said: "The sewers of the City, like its works for supplying the City with water, are the private property of the City—they belong to the City. A corporation and its corporators, the citizens are alone interested in them—the outside public or people of the State at large, have no interest in them, as they have in the streets of the City, which are public highways."

Especially is this true in the case at bar, since it appears from the record that a charge of Twenty Dollars ($20.00) per lot for each lot of 25x100 feet, is made by the City against the owner of each lot for the privilege of connecting with the sewers of said City, and the fees so collected, belong exclusively to the said City and are used for City purposes. (Rec. p. 23.)

What has just been said likewise applies to the ninth ground of demurrer, which is as follows: "The allegations of the bill do not show that the public is using private property for public use, but, on the contrary, public property for public use."
9 In addition to the authorities cited under the discussion of the eighth ground of demurrer, it is respectfully insisted that in Virginia, oyster beds and the oysters planted thereon, are private property.

It is true that the beds of navigable waters are held in trust by the State for the benefit of the public, but in the exercise of that trust, as shown by the authorities cited in the discussion of the first ground of demurrer, the Legislature has the right to lease portions of the beds

for oyster planting purposes. The right to make such leases being conceded, as it must be, then it follows necessarily that as soon as such leases are made, grounds covered by the same represent private property. In other words, the Legislature has determined in this way that it is for the benefit of the people of the whole State that these leases be made, "subject only to the right of fishing in waters above the said bottom," and subject, of course, to the right of navigation. That this is a property right is upheld by repeated decisions of this Court and other Courts of last resort. In Power v. Tazewells, 25 Grat. 786, the right to maintain an action of unlawful entry and detainer for the recovery of oyster planting ground was upheld. And in the same case the assignment was made under the Act of Assembly in force April 1, 1873. By an Act approved April 18, 1874, the Act of 1873 was repealed, and it was contended that such repeal operated to divest the plaintiffs of their rights under the assignment. The Court said: "The new act, which repeals the act of 1873, was approved on the 18th day of April, 1874. By the acts of assignment, which were executed when the act of 1873 was in force, they were invested with the exclusive right to the use and occupancy of the premises, provided they caused them to be marked by suitable stakes before the 1st of May, 1874, which requirement and condition was strictly within the inspector's authority. They complied with that proviso to the letter, and caused the reservations to be marked with suitable stakes before the 1st of May, 1874; that is, about the 26th of April. And the Court is of opinion that although it was not done until after the repealing act was passed, it was a fulfilment of the condition which entitled them to the right, and that upon the performance thereof their right to the exclusive use and occupancy of the premises vested, and cannot be affected in any way by the repeal of the former act."

The principle here invoked has also been recognized by this Court in the case of Newport News S. Co. v. Jones, 105 Va. 503. The controversy in that case was between a shipbuilding company dredging and occupying a certain portion of the bed of James River between the low water mark and the channel opposite the City of Newport News, under charter from the Legislature and amendments thereto, and an oyster planter to whom had been subsequently leased a portion of the ground occupied by the said shipbuilding company. The Court, after recognizing the general principle that the navigable waters below low water mark and the soil under them are the property of the State, to be controlled by the State, in its own discretion, for the benefit of the people of the State nevertheless recognized the principle that to deprive the shipbuilding company of its right to use the soil under James River aforesaid, by subsequent legislation, would be in violation of the State and Federal constitutions. In the course of the opinion it is said: "Not only was the denial of appellant's superior right in contravention of the statute, but the commissioner's conclusion of law, sustained by the decree of the Court, 'that the plaintiff company could not use the land without paying appellee therefor,' was equivalent to giving to the assignment the force and effect of depriving appellant of valuable

property rights without compensation; and, in derogation of the Fourteenth Amendment of the constitution of the United States, without due process of law. * * *

"Nevertheless, the practical effect of the decree of the trial court in adopting the commissioner's conclusion of law is to give precedence to appellee's inferior right, under the express provisions of the oyster law, to the previously acquired and, therefore, superior right of appellant. * * *

"A grant of the right of wharfage, at a wharf adjoining land under water belonging to the grantor, carries with it, as a necessary incident and appurtenance, and as part of the grant, a right of way or access to the wharf for vessels over such adjacent lands.

"The State has succeeded to all the rights of both the crown and parliament of England in the navigable waters within its limits, and in the soil under them; it holds them as absolute owner, and except as restrained by constitutional limitations, its right to grant them is absolute and uncontrollable.

"Where valid grants are once made by the State the property granted can only be resumed by it when needed for the public use, under the right of eminent domain, upon making compensation. Langdon v. Mayor, &c., of City of N. Y., 93 N. Y. 129."

On principle, there cannot be any distinction between the grant by the Legislature of the bed of a navigable stream for shipbuilding purposes, and a similar grant for the propagation of oysters,
11 and in either case the right, when once given, cannot be destroyed by subsequent legislation. And following the same reasoning, when the State granted your complainant the rights set out in the bill in this case, he could not thereafter be deprived of those rights by legislation, which attempted to give to an individual or municipal corporation other rights resulting necessarily in the damaging and destruction of his property. The doctrine here invoked is supported by numerous decisions in other states, and with little or no dissent. The cases are collected in a valuable note to Platt Bros. & Co. v. Waterbury (Conn.), 48 L. R. A. 691. A valuable case and one wherein the facts are practically identical with those in the case at bar, is Huffmire v. City of Brooklyn, 162 (N. Y.) 584, 48 L. R. A. 421.

The two cases last cited will hereafter be discussed more at length.

The tenth ground of demurrer is merely a repetition of other grounds of demurrer assigned by the defendant, which have already been discussed.

The eleventh ground of demurrer makes the contention that under Section 13 of the General Oyster Laws of 1910 (Acts of 1910, p. 340), the State had no right to lease the land in controversy for oyster purposes.

This contention is without merit for several reasons:

1. There is nothing in the bill to justify the assumption that the leased ground is "in front of and adjacent to" the City of Newport News.

2. In the second place, the act above referred to, as will appear from its title, purports to be an act to "revise, arrange, amend and

consolidate into one act certain laws relating to oysters, etc." Section 13 of the act is as follows: "Right of planters to erect piers, et cetera.—Any person holding planting ground rented from the State is hereby authorized to erect thereon a pier, dock, watchhouse, or shuckinghouse for the purpose of handling, watching or shucking oysters: provided, however, that it shall not obstruct navigation nor otherwise injure the private rights of any person, and shall be subject to the laws of the State governing wharves, piers and docks; and provided further, that this act shall not apply to any ground lying in front of and adjacent to any city within the Commonwealth."

12 This act was taken verbatim from an act approved December 31, 1903 (Acts of 1902-3-4, p. 861, as amended by Acts of 1904, p. 272), and the title to this act is, "An Act to authorize parties planting oysters on ground rented from the State to erect piers, docks, or watch-houses on the same." The act concludes "provided further, that this act shall not apply to any grounds lying in front of and adjacent to the cities of the Commonwealth." It is, therefore, perfectly apparent from the title and body of the act that the prohibition only applies to the construction of piers, docks, etc., on grounds lying in front of and adjacent to cities.

3. In the third place, even if the act were susceptible of the construction contended for by defendant's counsel, the City could not avail itself of this defense. The State alone, by appropriate proceeding, might re-claim the land.

Having now considered the sundry grounds of demurrer interposed by defendant, we beg to submit certain propositions of law which we believe are sustained by the cases and text-writers.

In the installation of its sewer system, the City of Newport News had no right to take or damage the property of complainant.

In the discussion of the third ground of demurrer many authorities are cited to sustain this proposition, and reference is here made to the same.

In 2 Dillon on Municipal Corporations, Sec. 1047, it is said: "It is, perhaps, impossible to reconcile all of the cases on this subject, and courts of the highest respectability have held that if the sewer, whatever its plan, is so constructed by the municipal authorities as to cause a positive and direct invasion of the plaintiff's private property, as by collecting and throwing upon it, to his damage, water or sewage which would not otherwise have flowed or found its way there, the corporation is liable. This exception to the general doctrine, when properly limited and applied, seems to be founded on sound principles, and will have a salutary effect in inducing care on the part of the municipality to prevent such injuries to private property, and will operate justly in giving redress to the sufferer if such injuries are inflicted. Accordingly, although a municipality having the power to construct drains and sewers may lawfully cause them to be built so as to discharge their refuse matter into the sea, or natural stream of water, yet this right must be so exercised

13 as not to create a nuisance, public or private. If a public nuisance is created, the public has a remedy by a public prosecution; and any individual who suffers special injury therefrom may recover therefor in a civil action."

The same author, in Sec. 1051-A, continues: "In such case the injury to the property owner is manifest. It is caused by the sole act or neglect of the municipal authorities. They alone have the power to remove the cause. The property owner is substantially remediless unless he can quicken and secure corporate action by means of a civil suit for damages. The City as the corporate representative of the fasciculus of local interests which make sewers a necessity for the benefit of all of the inhabitants of the municipality, is the author of the injury which the plaintiff in the case supposed sustains in the attempt to benefit all. The dictate of justice is that no person should suffer unequally, and, if he does, that all should make compensation. If the City has the power and the means by taxation or otherwise to remedy the defective sewer, and yet, under the conditions above defined and limited, continues such sewer, it must on legal principles be liable, unless it can justify its act or omission by its legislative powers and duties relating thereto. Certain it is that these powers were not given with any such intent. Under the usual constitutional limitations on legislative action it is at least doubtful whether powers so injurious to, and so destructive of, private rights could be directly conferred, and if not, how can they be held to be obliquely granted, or to be embraced in large and general grants of authority? Such delegations of authority are to be construed favorably to the rights of the citizen, and may, we think, reasonably be considered as implying a condition that it shall not be exercised so as to inflict unnecessary or at all events negligent injuries upon private property."

In Brayton v. Fall River, 113 (Mass.) 218, 227, it is said: "The defendants had the right to make these sewers or drains and to discharge them into the sea. But this right is subject to some limitations. It does not include the right to create a nuisance, public or private. If the sewers or drains are so built or managed as to create a public nuisance, the defendants are indictable; if a private nuisance is created, they are answerable in damages to the person injured. Haskell v. New Bedford, 108 Mass. 208; Emery v. Lowell, 104 Mass. 13; Child v. Boston, 4 Allen, 41; Richardson v. Boston, 19 How., 263; Gerrish v. Brown, 51 Maine 256; Attorney-General v. Birmingham, 4 Kay & Johns, 528."

14 In Haskell v. New Bedford, 108 Mass. 208, 215, Gray, J., in delivering the opinion of the Court, said in part: "But the right conferred upon the City of New Bedford to lay out common sewers 'through any streets or private lands' does not include the right to create a nuisance, public or private, upon the property of the Commonwealth, or of an individual, within tide water. Hale de Portibus Maris, c. 7, in Hargr. Law Tracts, 85; Boston v. Richardson, 19 How. 263, 270, and 24 How. 188, 193; Proprietors of Locks & Canals v. Lowell, 7 Gray 223; Sherman v. Tobey, 3 Allen 7; At-

torney-General v. Birmingham, 4 Kay & Johns, 528; Attorney-General v. Leeds, Law Rep. 5 Ch. 583."

The cases above cited in the opinion of Judge Gray conclusively show that the Massachusetts Court is in all respects in entire accord with the doctrine contended for in this petition. It is well to bear this in mind, for the reason that the case of Haskell v. New Bedford is cited with approval by Judge Harrison, in delivering the opinion of this Court in the case of City of Hampton v. Watson, 12 Va. App. 51, which will be hereinafter discussed.

Especially is the doctrine here invoked applicable, when it is entirely practicable to construct a system of sewers which will not create a nuisance or damage the property of others.

Morse v. Worcester, 139 (Mass.), 389, and cases there cited.

In the last mentioned case it is said: "When the Legislature authorizes a city or town to construct sewers, or to use a natural stream as a sewer, it is not to be assumed that it intends to authorize the city or town so to construct its sewers, or so to use the stream, as to create a nuisance, unless this is the necessary result of the powers granted. On the contrary, if it is practicable to do the work authorized without creating a nuisance, it is to be presumed that the Legislature intended that it should be so done."

"In the case at bar, the Legislature authorized the City of Worcester to use Mill Brook as a sewer; by necessary implication, the statute authorized it to empty its sewage into Blackstone River; but we cannot presume that it was the intention of the Legislature to exempt the city from the obligation to use due care in the construction and management of its works, so as not to cause any unnecessarily injurious consequences to the rights of others. If it is practicable to use any methods of constructing the sewer, and, as a part of the construction, of purifying the sewage at its mouth, at an expense which is reasonable, having regard to the nature of the work and the magnitude and importance of the interests involved, it is the duty of the city to adopt such methods."

As has been already seen, the bill in this case alleges that it was not only practicable to construct a system of sewers which would not injure or destroy the complainant's property, but that the same had actually been so constructed and operated for several years. And it was the change made in the system in 1907, which resulted in the injury complained of.

The taking and damaging of petitioner's oysters and oyster planting ground, and the act of the legislature of Virginia authorizing (if it be deemed to authorize) the taking and damaging of his oysters and oyster planting ground, is in violation of the Constitution of the State of Virginia, and especially of sections eleven (11) and fifty-eight (58) thereof.

So much of said Sections as is pertinent to the questions involved in this suit, is as follows:

Constitution of Virginia, 1902:

Sec. 11. No person shall be deprived of his property without due process of law. * * *

Constitution of Virginia, 1902:

Sec. 58. The General Assembly shall not pass any bill of attainder, or any ex post facto law, or any law impairing the obligation of contracts, or any law abridging the freedom of speech or of the press. It shall not enact any law whereby private property shall be taken or damaged for public uses, without just compensation. * * *

It is submitted that the authorities hereinbefore cited, sustain the following propositions:

(*a*) The State of Virginia had the right to lease this oyster planting ground to petitioner.

(*b*) Upon the execution of said lease, the said planting
16 ground became the private property of petitioner, subject only to the right of fishing and the right of navigation.

(*c*) This property could not be taken or damaged without just compensation.

(*d*) The Act of the Legislature of Virginia contained in Section 29 of the Charter of the City of Newport News authorizing said City to build or acquire sewers within the said City, if it be construed to authorize the taking or damaging of petitioner's oysters and oyster planting ground, impairs the obligation of the contract theretofore entered into between the said State and petitioner.

In the case of Huffmire v. Brooklyn, 162 (N. Y.) 584, 48 L. R. A. 421, the facts were practically identical with the facts in the case at bar, save in the Huffmire case the lease or assignment is designated as a "permit." Huffmire's oysters and oyster planting ground were located in tidewater bordering upon the City of Brooklyn. The Legislature of New York authorized the town of Flatbush (afterwards a part of the City of Brooklyn) to build a sewer to empty into the waters of Jamaica Bay, wherein Huffmire's oysters were planted, and the construction and operation of this sewer caused the damages complained of. The Court said in part:

"The plaintiffs contend that the casting of noxious and destructive substances upon their oyster bed was not a consequential, but a direct injury. The defendant insists that the discharge of the sewer in question into the waters of Mill Creek is simply the consequential result of obedience to the legislative mandate, and that, in the absence of negligence on the part of the municipal authorities in the construction and operation of said sewer, the defendant is not liable. Applying the rule which the defendant invokes in all its force and breadth, we think this case falls directly within the constitutional inhibition against the taking of property without compensation. The plaintiffs were lawfully in possession of a piece of land under water upon which they had planted a bed of oysters. They had their title under legislative authority, which was as ample

and unquestioned as that under which defendant's sewer was constructed. Although this land was under public waters, it was as much the private property of the plaintiffs as though it had been a tract of farm land held under a lease from the town of Flatlands under legislative authority. The act of the defendant in pouring its sewage upon this land was not consequential. It was as direct
17 as though it had been discharged upon a piece of land owned or rented by the plaintiffs, and used for farming or gardening purposes. In the latter case a municipal corporation could not successfully defend its trespass because it was acting under legislative authority, or because its sewage had been carried to the lands of the person complaining over the lands of others. The fact that plaintiff's land was under public water, and that defendant's sewage was discharged upon it, after passing through 300 feet of public water the land under which was not in the possession or control of the plaintiffs, does not differentiate this case in principle from the illustrative case of a discharge of sewage upon surface lands. In either case the injury is so direct as to amount to an invasion of a private right, which no legislative sanction or direction can justify or excuse. These views are, we think, sustained by abundant authority."

And again:

"We are of the opinion that any direct invasion of a man's land is a taking of his property within the meaning of the Constitution. The destruction of plaintiff's oysters by the casting of sewage upon them was as clearly a taking of their property as the physical removal and conversion of the same would have been."

The taking, depriving and damaging of petitioner's oysters and oyster planting ground, and the act of the Legislature of Virginia authorizing (if it be construed to authorize) the same, is in violation of the Constitution of the United States, and especially the provisions of article 1, section 10, and the Fourteenth amendment to the said Constitution. The protection of the Constitution of the United States, and especially the provisions aforesaid, are hereby invoked by your petitioner.

(*a*) It is insisted that the lease or assignment to petitioner of the oyster planting ground in controversy, pursuant to authority vested in State officials by statute, constitutes a contract which cannot be impaired or destroyed by subsequent legislation.

Cooley's Con. Lim. (6th Ed.) p. 328;
18 Fletcher v. Peck, 6 Cranch. 87, 136;
State of New Jersey v. Wilson, 7 Cranch 64.

(*b*) The requirement of "due process of law" in the Fourteenth Amendment to the Constitution of the United States forbids the taking of private property for public uses, without making just compensation.

Chicago etc. R. R. Co. v. Chicago, 166 U. S. 226, 41 L. Ed. 979;
Norwood v. Baker, 172 U. S. 269, 43 L. Ed. 443.
City of Hampton v. Watson, 12 Va. App. 51, not controlling.

The above case was an action of law instituted by S. J. Watson against the City of Hampton, to recover damages for the alleged unlawful pollution of the waters of Hampton Creek caused by the sewers of the defendant City emptying therein, whereby his oyster beds were damaged.

The facts in the above case, briefly stated, are these:

The City of Hampton constructed its sewer system in 1899, making certain additions thereto in 1908, all of which sewers empty into Hampton Creek at various places.

Long prior to the construction of said sewer system, there were private sewer systems established by the National Soldiers' Home, the Hampton Normal School and other institutions having over four thousand inmates, and all of these private sewers emptied into Hampton Creek. The sewage from these private systems was many times more than sufficient to pollute the waters of Hampton Creek, and to forbid the sale of oysters therefrom.

In the year 1909, the oyster planters in Hampton Creek were notified by the Health Officer of the County that those waters were too polluted to permit the sale of oysters therefrom, and a similar notice was given by the United States health authorities.

Watson's original lease expired in 1912, and was not renewed until the year 1915. The suit against the City was instituted in the year 1915.

Upon a consideration of the above facts, it is earnestly submitted that the Watson case is easily distinguishable from the case at bar for the following reasons:

19 (*a*) Watson took his lease not only subject to conditions as they then existed, but with actual knowledge of such conditions and with notice from the health authorities that any oysters planted on the ground in controversy would necessarily be polluted. The City of Hampton constructed its sewer system long prior to Watson's lease, and private sewer systems would have polluted these oysters independently of any sewage from the City.

Under these circumstances, it is submitted that sundry grounds of defense, including the doctrine of avoidable consequences, would have precluded a recovery in this damage suit.

In the case at bar, Darling acquired his rights long prior to the establishment of the sewer system of Newport News—in fact, long prior to the incorporation of said City.

(*b*) The allegations of the bill of complaint in this case, and especially the allegations of Section "C" of the bill (Rec. p. 14), show that the City of Newport News negligently constructed a sewer system, the necessary effect of which was to ruin petitioner's oysters and planting ground; that such action was taken against the advice of a competent Civil Engineer employed for the purpose, and with full knowledge of the disastrous results which would follow to the interests of petitioner; and that it was entirely practicable to have constructed said sewer system so that it would not have injured petitioner's property.

None of these conditions were present in the Watson case, and the authorities hereinbefore cited, especially those cited under the

discussion of the Third and Eighth grounds of demurrer, hold that the allegations referred to entitle the petitioner to the relief prayed for.

(c) It was not suggested in the Watson case that the taking or damaging of his property was in violation of the Constitution of Virginia, or the Constitution of the United States. Both of these questions are raised in the case at bar.

In addition to these considerations, it is earnestly submitted that the cases cited by the Court in the case of City of Hampton v. Watson, supra, do not justify the conclusion that in every case the oyster planter in Virginia holds his leased ground subject to the right of any City to damage or destroy the same for sewage or like purposes, and without providing any compensation for the owner of the property.

There is nothing in the case of Taylor v. Commonwealth,
20 102 Va. 759, in conflict with the principles herein announced. On the contrary, a careful consideration of the opinion of Keith, President, will show that that case sustains the contentions herein made.

To the same effect is the case of Illinois Central R. R. Company v. Illinois, 146 U. S. 387, 36 L. Ed. 1045.

The case of N. N. S. & D. D. Company v. Jones, 105 Va. 503, has already been cited and discussed.

In the case of Haskell v. New Bedford, 108 Mass. 208, the owner of a parcel of land and wharf in New Bedford, bounded on tidewater, instituted a suit against the City to restrain it from emptying sewage into the tidal waters surrounding his dock. The Court entered a decree perpetuating the injunction, on the ground that such action on the part of the City was an unlawful interference with complainant's property rights. There is nothing in the opinion to indicate that where the property of an individual is taken or damaged by a City in the construction of sewers, just compensation must not be paid, or an injunction awarded to the injured party.

In the case of Sayre v. Newark (N. J.), 48 L. R. A. 722, it was held by a divided Court that the owner of a dock in a tidal river was not entitled to an injunction restraining a city from completing and using a public sewer in process of construction and designed to empty into the river. The decision, however, was based upon the ground that the threatened damage would simply be consequential damage, and not a direct taking or invasion of complainant's property. It is clear that the decision would have been otherwise, had the Court found as a fact that the property of complainant was actually taken, and in Virginia a different conclusion would have been reached under a constitutional provision which prohibits taking or damaging private property.

For a learned decision of the distinction here invoked, see note to 48 L. R. A. 691. This distinction is further emphasized in the case of Huffmire v. Brooklyn, 162 N. Y. 584, 48 L. R. A. 421, hereinbefore referred to; and in view of that decision, which was a unanimous opinion of the New York Court of Appeals, it will be unnecessary to comment on the case of Coxe v. State (N. Y.), 39 N. E. 400,

further than to say that the facts in that case were entirely unlike those in the case at bar.

For these reasons, and for such others as your Honors may allow at the hearing of this cause, your petitioner prays that your Honors will allow an appeal from the decree aforesaid, and award to him a writ of supersedeas to the said decree, and reverse and annul
21 the same, and as in duty bound, *he* will ever pray, etc.

Respectfully submitted,

JONES & WOODWARD,
J. WINSTON READ,
Counsel for Petitioner.

We, Maryus Jones and J. Winston Read, attorneys, practicing in the Supreme Court of Appeals of Virginia, do hereby certify that in our opinion, the final decree entered in the chancery suit of Frank W. Darling vs. City of Newport News, in the Circuit Court of the said City of Newport News, dismissing the original and amended bills filed in said cause, is erroneous, and that the same should be reviewed and reversed by the Supreme Court of Appeals.

MARYUS JONES.
J. WINSTON READ.

Appeal and supersedeas *as* allowed Tuesday March 27, 1917, Bond $200.00.

VIRGINIA:

Pleas Before the Circuit Court of the City of Newport News, at the Court-house Thereof, on Wednesday, the 27th Day of September, in the Year One Thousand Nine Hundred and Sixteen.

Be it remembered, that heretofore, to-wit: At rules held in the Clerk's office of the said Court on the third Monday in January, 1916, that being the 17th day of January, 1916, came Frank W. Darling, by counsel, and filed his bill in chancery against City of Newport News, a municipal corporation; which said bill in chancery is in the words and figures following, to-wit:

In the Circuit Court for the City of Newport News, Virginia.

FRANK W. DARLING, Complainant,

vs.

CITY OF NEWPORT NEWS, a Municipal Corporation, Defendant.

22 To the Honorable C. W. Robinson, Judge of said Court:

Your complainant, Frank W. Darling, humbly complaining, respectfully shows to the Court:

1.

Complainant is a citizen of the State of Virginia, residing in the City of Hampton, Virginia, and has been a resident of the County of Elizabeth City, Virginia, all his life.

For many years prior to the incorporation of the City of Newport News, Virginia, and up to the present time, he has been the lessee of a large area of oyster planting ground from the State of Virginia, which ground is located in the body of water known as Hampton Roads, lying to the South and Southeast of said City. The total acreage in the various assignments of ground now owned or leased by your complainant in Hampton Roads aggregates about eighteen hundred acres, all of which is located on the Northern side of said Hampton Roads, near the City of Newport News. Upon this ground complainant has planted from time to time, many thousands of bushels of seed oysters, and the number of bushels now upon the same will approximate four hundred thousand (400,000), many thousands of bushels of which are now of sufficient size to be taken up and marketed, in the event a market could be had for same. Complainant has paid the rent of said ground and otherwise complied with the oyster laws of the State.

2.

Complainant further shows to the Court he has practically spent his life in the building up of his oyster business, including planting, shucking and shipping oysters, expending therein not only his time and labor, but a great outlay of money, representing an investment of hundreds of thousands of dollars. To this end he has provided himself with an expensive oyster plant, located in the City of Hampton, oyster boats, watch-houses, and all other paraphernalia necessary to a successful conduct of his business. This business, in the absence of contamination as hereinafter stated, your complainant estimates to be worth at least the sum of Three Hundred Thousand Dollars ($300,000.00). His customers are located in most of the States east of the Mississippi.

Complainant here shows to the Court that the City of Newport News was incorporated in the year 1896, and about the year
23 1900 constructed a system of permanent sewers. The outlets to these sewers are in the James River and Hampton Roads, at, near or adjacent to the oyster beds of your complainant, and the tide carries the sewage therefrom over and across the said oyster beds. For many years this sewage was not discharged in sufficient quantities to produce perceptible injury to your complainant, but the same has been recently increased so that now the very existence of his business is threatened. And your complainant is advised that the said defendant is now laying additional sewers and preparing greatly to enlarge its sewerage system, without taking any measure whatsoever to provide for the purification of said sewage but with the intent and purpose to discharge same into said Hampton Roads and over and across your complainant's oyster beds.

3.

Complainant here shows to the Court that the necessary result of the discharge of said sewage as aforesaid, consisting of the excrement and urine of man and beast and other filth is to contaminate and pollute the said oysters, infecting the same with colon bacilli and others germs and rendering them unfit for consumption.

The Department of Health in the State of Virginia, as well as the Department of the United States Government charged with this duty, has in recent years, from time to time, made examinations of the oysters taken from your complainant's planting grounds, many of which showed the presence of these colon bacilli. But until a short time before the institution of this suit, infection has not been sufficient to justify the said State and Federal Governments in stopping the sale of your complainant's oysters, though the condition of the said oysters has been near the danger line. However, the United States Government, through its chemists and other employees, recently made another examination of said oyster beds and condemned a portion of the same, declared the oysters thereon unfit for consumption, and forbade the sale of same by your complainant, and the said finding of the said Federal Officer was followed and adopted by the Health Department of the State of Virginia. The strip so condemned consists of about one hundred acres lying near the mouth of Salter's Creek, into which Creek the said City of Newport News empties a large portion of its sewage as aforesaid.

At the time of said condemnation, however, the State Federal authorities advised your complainant that unless steps were
24 taken by the City of Newport News to purify the said sewage or dispose of the same otherwise than by emptying it into Hampton Roads and waters adjacent to your complainant's oyster beds, all of said oyster planting grounds would shortly have to be condemned. Such a result would mean not only the loss of the oysters now planted on said grounds, but the ruination of your complainant's business, which it has taken years to build up. The remedy at law is wholly inadequate, not only for the reason that it would be impossible to measure the damage and extent of your complainant's loss, but because such remedy would not prevent the ultimate loss of your complainant's business, which it is the province of this Court alone to do.

4.

Complaina-t further shows to the Court that it is entirely practicable to provide a method of purification of said sewage, or other disposition thereof, which will render the same perfectly harmless, which methods have been adopted in the more advanced centers of population in the Old World and many States and Towns of the United States.

5.

Complainant further avers that he has already suffered great loss from the contamination of his oysters as aforesaid, and from the re-

ports thereof sent out to various sections of the United States; and unless this Honorable Court proceeds to protect your complainant's rights and interests by injunction or other approp-iate process, complainant will suffer irreparable loss and damage, and his business be totally destroyed.

The premises considered, and inasmuch as your complainant is remediless, save by the aid of a Court of Equity, wherein such matters are alone cognizable, he prays that the said City of Newport News, a mun-cipal corporation, be made a party defendant to this suit, and required to answer the same fully and truthfully, but not on oath, which is waived; that proper process issue and all necessary orders and decrees be entered; that an injunction issue from this Honorable Court restraining the said defendant from emptying the said sewage into Hampton Roads or James River or any tributary thereof so that the tide will carry same over and across your complainant's oyster beds, or that the said sewage be purified or otherwise rendered harmless before it is emptied into said waters; or should this Honorable Court deem it proper to give the said defendant a reasonable time in which to construct the necessary plant or works incident to a purification of said sewage, then your complainant prays that an injunction may issue to become effective at the expiration of such time as your Honor may deem reasonable; and that you- complainant may have such other and further and general relief as the nature of his case may require, or to equity may seem meet. And he will ever pray, etc.

FRANK W. DARLING.

JONES & WOODWARD &
J. WINSTON READ,
Attys.

And at another day, to-wit: At rules held in the Clerk's office of the said Circuit Court of the City of Newport News, on the first Monday in February, 1916, came the defendant, by *his* counsel, and filed its Demurrer to the plaintiff's bill, which said Demurrer is in the following words and figures, to-wit:

In the Circuit Court for the City of Newport News, Virginia.

FRANK W. DARLING

vs.

CITY OF NEWPORT NEWS, a Municipal Corporation.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true in manner and form as the same are therein set out, doth demur thereto, and for the cause of demurrer says:

That the tidal salt waters of Hampton Roads and James River, and the soil beneath the same, are owned and held by the Common-

wealth of Virginia, in trust for all the people of the Commonwealth, and cannot be granted, aliened, devised or conveyed contrary to, against, or to the detriment of the public interest and use thereof.

That the oyster lands in the said bill set out, and the waters above the same, are owned and held by the Commonwealth in trust for all people, and cannpt be leased to the complainant as against or
26 in conflict with the interest of the public thereto and therein.

That the bill shows the defendant is a municipal corporation in the State of Virginia, and as such is charged with the duties of protecting the public health, and to construct sewers to carry away the sewage of said city, and has the right to empty the same into the tidal salt waters of the Commonwealth, in the discharge of said duty, as set out in said bill.

J. A. MASSIE,
City Atty. p. d.

In the Circuit Court for the City of Newport News, Virginia.

F. W. DARLING

vs.

CITY OF NEWPORT NEWS, a Municipal Corporation.

Additional Grounds of Demurrer.

The bill fails to properly allege that the injury complained of by the complainant is different in kind from that sustained by the general public.

That the acts complained of in the bill are not different in kind from that sustained by the general public, but if any, only in degree.

That the complainant has sufficient, adequate and complete remedy at law.

That the allegations of the bill show the oyster planting ground to be leased from the State of Virginia, by the Complainant, show that is is adjacent to the City of Newport News, and therefore under the laws of the State of Virginia not open to lease by the complainant.

That under the laws of the State of Virginia, the oyster planting ground claimed to be leased from the State by the complainant, is withheld from lease, and they have no rights thereto.

J. A. MASSIE,
City Attorney.

And at another day, to-wit: At a Circuit Court continued by adjournment and held for the City of Newport News, at the Courthouse thereof, on Wednesday, the 22nd day of March, A. D., 1916.

27 In Chancery.

F. W. DARLING, Plaintiff,

vs.

CITY OF NEWPORT NEWS, a Municipal Corporation, Defendant.

Decree.

On motion of the plaintiff, he is allowed to amend his bill regularly filed at rules, then this cause came on to be heard on the bill of the plaintiff so amended, and the demurrer of the defendant thereto, and was argued by counsel, on consideration whereof the Court doth adjudge, order and decree, that the said demurrer be and the same is hereby overruled.

And the court doth reserve, etc.

And at another day, to-wit: At a Circuit Court continued by adjournment and held for the City of Newport News, at the Court-House thereof, on Friday, the 14th day of July, A. D., 1916.

In the Circuit Court of the City of Newport News, Virginia.

In Chancery.

FRANK W. DARLING

v.

CITY OF NEWPORT NEWS, a Municipal Corporation.

Decree.

On motion of the complainant leave is granted him to file his amended and supplemental bill, which is accordingly done; to the filing of which the defendant objected and thereupon the defendant filed its demurrer to the said amended and supplemental bill. And on motion of the defendant the Court doth allow him thirty days from this date to state its objections to filing said bill and file the grounds of its demurrer to the said amended and supplemental bill in writing.

And by the consent of the parties entered of record, this cause is submitted to the Judge of this Court for such decision and decree therein in vacation as might be made in term.

The Complainant's amended and Supplemental bill is in the following words and figures, to-wit:

In the Circuit Court for the City of Newport News, Virginia.

28 FRANK W. DARLING, Complainant,

vs.

CITY OF NEWPORT NEWS, a Municipal Corporation, Defendant.

To the Honorable C. W. Robinson, Judge of said Court:

Your complainant, Frank W. Darling, humbly complaining, respectfully shows to the Court that he heretofore filed his original bill in this cause, which is in the following words and figures:

1.

Complainant is a citizen of the State of Virginia, residing in the City of Hampton, Virginia, and has been a resident of the County of Elizabeth City, Virginia, all his life.

For many years prior to the incorporation of the City of Newport News, Virginia, and up to the present time, he has been the lessee of a large area of oyster planting ground from the State of Virginia, which ground is located in the body of water known as Hampton Roads, lying to the South and Southeast of said City. The total acreage in the various assignments of ground now owned or leased by your complainant in Hampton Roads aggregates about eighteen hundred acres, all of which is located on the Northern side of said Hampton Roads near the City of Newport News. Upon this ground complainant has planted from time to time, many thousands of bushels of seed oysters, and the number of bushels now upon the same will approximate four hundred thousand (400,000), many thousands of bushels of which are now of sufficient size to be taken up and marketed, in the event a market could be had for the same. Complainant has paid the rent of said ground and otherwise complied with the oyster laws of the State.

2.

Complainant further shows to the Court that he has practically spent his life in the building up of his oyster business, including planting, shucking and shipping oysters, expend-ng therein not only his time and labor, but a great outlay of money, representing an investment of hundreds of thousands of dollars. To this end he has provided himself with an expensive oyster plant, located in the City of Hampton, oyster boats, watch-houses, and all other para-
29 phernalia necessary to a successful conduct of his business. This business, in the absence of contamination as hereinafter stated, your complainant estimated to be worth at least the sum of Three Hundred Thousand Dollars ($300,000). His customers are located in most of the States east of the Mississippi.

Complainant here shows to the Court that the City of Newport News was incorporated in the year 1896, and about the year 1900 constructed a system of permanent sewers. The outlets to these sewers are in the James River and Hampton Roads, at, near or adjacent to the oyster beds of your complainant, and the tide carries the sewage therefrom over and across the said oyster beds. For many years this sewage was not discharged in sufficient quantities to produce perceptible injury to your complainant, but the same has been recently increased so that now the very existence of his business is threatened. And your complainant is advised that the said defendant is now laying additional sewers and preparing greatly to enlarge its sewerage system, without taking any measures whatsoever to provide for the purification of said sewage, but with the intent and purpose to discharge same into said Hampton Roads and over and across your complainant's oyster beds.

3.

Complainant here shows to the Court that the necessary result of the discharge of the said sewage, consisting of the excrement and urine of man and beast and other filth of the said city, as aforesaid, is to contaminate and pollute the said oysters, infecting the same with colon bacilli and other germs and rendering them unfit for consumption.

The Department of Health in the State of Virginia, as well as the Department of the United States Government charged with this duty, has in recent years, from time to time, made examination of the oyster- taken from yo*h*r complainant's planting grounds, many of which showed the presence of these colon bacilli. But until a short time before the institution of this suit, infection has not been sufficient to justify the said State and Federal Governments in stopping the sale of your complainant's oysters, though the condition of the said oysters has been near the danger line. However, the United States Government, through its chemists and other employees, recently made another examination of said oyster beds and condemned a portion of the same, declaring the oysters thereon unfit for consumption, and forbade the sale of same by your complainant, and the said finding of the said Federal Officer was followed and adopted by the Health Department of the State of Virginia. The strip so condemned consists of about one hundred acres lying near the mouth of Salter's Creek, into which Creek the said City of Newport News empties a large portion of its sewage as aforesaid.

At the time of said condemnation, however, the State Federal authorities advised your complainant that unless steps were taken by the City of Newport News to purify the said sewage or dispose of the same otherwise than by emptying it into Hampton Roads and waters adjacent to your complainant's oyster beds, all of said oyster planting grounds would shortly have to be condemned. Such a result would mean not only the loss of the oysters now planted on said

grounds, but the ruination of your complainant's business, which it has taken years to build up. The remedy at law is wholly inadequate, not only for the reason that it would be impossible to measure the damage and extent of your complainant's loss, but because such remedy would not prevent the ultimate loss of your complainant's business, which it is the province of this Court alone to do.

4.

Complainant further shows to the Court that it is entirely practicable to provide a method of purification of said sewage, or other disposition thereof, which will render the same perfectly harmless, which methods have been adopted in the more advanced centers of population in the Old World and many States and Towns of the United States.

5.

Complainant further avers that he has already suffered great loss from the contamination of his oysters as aforesaid, and from the reports thereof sent out to various sections of the United States; and unless this Honorable Court proceeds to protect your complainant's rights and interests by injunction or other appropriate process, complainant will suffer irreparable loss and damage, and his business be totally destroyed.

The premises considered, and inasmuch as your complainant is remediless, save by the aid of a Court of Equity, wherein such matters are alone cognizable, he prays that the said City of New-
31 port News, a municipal corporation, be made a party defendant to this suit, and required to answer the same fully and truthfully, but not on oath, which is waived; that proper process issue and all necessary orders and decrees be entered that *a* injunction issue from this Honorable Court restraining the said defendant from emptying the said sewage into Hampton Roads or James River or any tributary thereof so that the tide will carry same over and across your complainant's oyster beds, or that the said sewage be purified or otherwise rendered harmless befose it is emptied into said waters; or should this Honorable Court deem it proper to give the said defendant a reasonable time in which to construct the necessary plant or works incident to a purification of said sewage, then your complainant prays that an injunction may issue to become effective at the expiration of such time as your Honor may deem reasonable; and that your complainant may have such other further and general relief as the nature of his case may require, or to equity may seem meet. And he will ever pray, etc.

And now comes the complainant, and files his amanded and supplemental bill in the following words and figures:

A.

Complainant is a citizen of the State of Virginia, residing in the City of Hampton, Virginia, and has been a resident of the County of Elizabeth City, Virginia, all his life.

For many years prior to the incorporation of the City of Newport News, Virginia, and up to the present time, he has been the lessee of a large area of oyster planting ground from the State of Virginia, which ground is located in the body of wate- known as Hampton Roads, lying to the south and southeast of said City. The total acreage in the various assignments of ground now owned or leased by your complainant in Hampton Roads aggregates about eighteen hundred acres, all of which is located on the Northern side of said Hampton Roads near the City of Newport News. Upon this ground complainant has planted from time to time, ma-y thousands of bushels of seed oysters, and the number of bushels now upon the same will approximate four hundred thousand (400,000), ma-y thousand- of bushels of which are now of sufficient size to be taken up and marketed, in the event a market could be had for the same. Complainant has paid the rent of said ground and otherwise complied with
32 the oyster laws of the State.

A portion of the said oyster planting grounds was originally assigned to J. S. Darling, father of complainant, in 1884, then re-assigned in 1903 to complainant. The other portion of said oyster planting ground, originally owned by the Powhatan Oyster Company, was first assigned in May, 1885, and afterwards re-assigned in June, 1905. The said Powhatan Oyster Company was not a corporation, but owned jointly by complainant and other parties. And after the purchase of the interests of such other parties by complainant, the said oyster planting ground was re-assigned to complainant on November 6, 1912.

B.

Complainant further shows to the Court that the statutes enacted by the General Assembly of the State of Virginia, relating to oyster planting ground, guarantee the absolute right to the renter to continue to use and occupy such ground for a period of twenty years from the date of the assignment, subject only to the right of fishing in waters above the said bottom, provided such renter pays the rent of said ground annually in advance, and otherwise complies with said statute-. And in the event any lessee of oyster planting ground has the same, or any portion thereof, re-surveyed or re-assigned, such re-survey or re-assignment in part or in whole, is not construed as a new assignment of such ground, but is deemed to be a continuation of the original assignment.

C.

Complainant further shows to the Court that by an Act of the General Assembly, approved January 16, 1896, the City of Newport

News, was incorporated, and by section 29 of said Act the said City was given the right, among other things, "to build or acquire sewers within the said City."

Pursuant to the power vested in it by this Section of its Charter, the said City of Newport News, about the year 1900, proceeded to construct a sewer system. And under the advice of a competent Civil Engineer, the said City by its constituted authorities, proceeded to adopt a plan whereby all the sewage of said City should be carried through two main sewers located on Twenty-fifth and Thirty-fourth Streets, respectively, within said City, and emptied into the
33 James River on the Western side of said City. And to this end a pumping station was established in the Eastern section of said City, whereby the sewage from that section of said City could be forced into the two main sewers above mentioned, and thence carried in the James River on the Western side of said City. Prior to the establishment of said pumping station, however, the said City of Newport News, through its officers and agents and the council thereof had been advised by the Engineer in charge of said work, of the necessity and expediency of having its main sewers empty into the James River on the Western side of said City, in order that the said sewage might be carried into the main channel of said James River. Prior to giving said advice, the said Engineer had made a careful examination of the waters of Hampton Roads, at and near the mouth of Salter's Creek, with a view of ascertaining whether the dumping of sewage into said Creek would result in injury to the oyster planting grounds of your complainant and others, and had reached the conclusion that it would result in such injury and so advised the authorities of said City. And for this reason, the outlets of the main sewers, as hereinbefore stated, were placed in the James River.

Complainant further avers that notwithstanding the advice and warning aforesaid of a competent Civil Engineer employed for such purpose, the said City, in the spring or summer of the year 1907, abolished the said pumping station, owing principally to the expense incident to the maintenance thereof (which, however, was only a small amount), and constructed a main sewer for the Eastern portion of said City, running in part through the County of Elizabeth City, and emptying into Salter's Creek, a non-navigable stream, within the limits of said County and east of said City of Newport News.

Complainant is advised and so charges that the construction of said sewer emptying into Salter's Creek, was beyond the Charter powers of said City and not authorized by law; that in granting to the City of Newport News the right to build or acquire sewers in said City, it was never intended or contemplated by the Legislature that the said sewers should be so constructed as to take and destroy your complainant's property, especially in view of the fact that it was entirely practicable and proper to construct said sewage system so as to avoid such result; that the said City was guilty of gross negligence in the construction of the said Salter's Creek sewer; that the original plan

of said sewerage system was entirely practicable and adequate
34 for all purposes, and the emptying of sewage into the James River on the West side of said City would have *been* done little, if any, injury to your complainant's oyster ground and others similarly situa*u*ted.

Complainant here shows to the Court that the matters and things set out in this paragraph of the amended bill relative to the original plan for a system of sewers in said City, including the operation of a pumping station in the Eastern part of said City, the use therefor and the discontinuance thereof, only came to your complainant's knowledge within the past two weeks and after the filing of the original bill in this cause and the taking of sundry depo*o*itions.

Co*u*plainant likewise shows to the Court that at the time of the filing of the original bill, he was of opinion that the sewage from the Twenty-fifth Street and Thirty-fourth Street sewers aforesaid, was responsible to some extent for the pollution of his oysters. But from the evidence of experts taken in this cause as well as facts gathered from other sources, he is now convinced that said pollution is due almost entirely from the sewage emptied into Salter's Creek, and that the sewage emptied into James River goes out into the Main channel and has practically no effect on his oyster planting grounds. The sewage emptied into Salter's Creek flows out over complainant's oyster planting ground and a considerable portion thereof is deposited on the said oyster planting ground, and the oysters thereby contaminated.

A charge of twenty dollars ($20) per lot for each lot 25x100 feet is made by the said City against the owner of each lot, for the privilege of connecting with the sewers in said City, and the fees so collected belong exclusively to the said City and are used for city pur*p*oses.

D.

Complainant further shows to the Court that he has practically spent his life in the building up of his oyster business, including planting, shucking and shipping oysters, expending therein not only his time and labor, but a great outlay of money, representing an investment of hundreds of thousands of dollars. To this end — has provided himself with an expensive oyster plant, located in the City of Hamp*t*on, oyster boats, watch-houses, and all other paraphernalia necessary to a successful conduct of his business. This busi-
35 ness, in the absence of contamination as hereinbefore stated, your complainant estimated to be worth at least the sum of Three Hundred Thousand Dollars ($300,000.00). His customers are located in most of the states east of the Mississippi.

For many years the sewage discharge into Salter's Creek was not sufficient to produce perceptible injury to your complainant, but the same has been recently increased so that the very existence of his business is threatened. During the past year the population of said City of Newport News has greatly increased, and the sewage discharged into Salter's — has increased correspondingly. The said defendant is now laying additional sewers and preparing greatly to

enlarge its sewerage system, without taking any measures whatsoever to provide for the purification of said sewage, but with the intent and purpose to discharge same into said Salter's Creek and over and across and upon your complainant's oyster beds.

E.

Complainant here shows to the Court that the necessary result of the discharge of the said sewage, consisting of the excrement and urine of man and beast and other filth of the said City, as aforesaid, is to contaminate and pollute the said oyster-, infecting the same with colon bacilli and other germs and rendering them unfit for consumption, and effectually to take and destroy the said oyster planting ground, rendering it wholly unfit for the purpose for which it was leased from the State of Virginia.

The Department of Health in the State of Virginia, as well as the Department of the United States Government charged with this duty, has in recent years, from time to time, made examinations of the oysters taken from your complainant's planting grounds, many of which showed the presence of these colon bacilli. But until a short time before the institution of this suit, infection has not been sufficient to justify the said State and Federal Governments in stopping the sale of your complainant's oysters, though the condition of the said oysters has been near the danger line. However, the United States Government through its chemists and other employess, recently made another examination of said oyster beds and condemned a portion of the same, declaring the oysters thereon unfit for consumption, and forbade the sale of same by your complainant,

36 and the said finding of the said Federal Officer was followed and adopted by the Health Department of the State of Virginia. The strip so condemned consists of about one hundred acres lying near the mouth of Salter's Creek, into which Creek the said City of Newport News empties a large portion of its sewage as aforesaid.

At the time of said condemnation, however, the State and Federal authorities advise- your complainant that unless steps were taken by the City of Newport News to purify the said sewage or dispose of the same otherwise than by emptying it into Hampton Roads and waters adjacent to your complainant's oyster beds, all of said oyster planting grounds would shortly have to be condemned. Such a result would mean not only loss of the oysters now planted on said grounds and the destruction of said oyster planting grounds, but the ruination of your complainant's business, which it has taken years to build up. The remedy at law is wholly inadequate, not only for the reason that it would be impossible to measure the damage and extent of your complainant's loss, but because such remedy would not prevent the ultimate loss of your complainant's business, which it is the province of this Court alone to do.

F.

Complainant further shows to the Court that it is entirely practicable, at a moderate expense, to provide a method of purification of said sewage, or other disposition thereof, which will render the same perfectly harmless, which methods have been adopted in the more advanced centers of population in the Old World and many States and Towns of the United States.

G.

Complainant further avers that he has already suffered great loss from the contamination of his oysters as aforesaid, and the taking and destruction of his oysters planting ground, and from the reports thereof sent out to various sections of the United States; and unless this Honorable Court proceeds to protect your complainant's rights and interest by injunction or other appropriate process, complainant will suffer irreparable loss and damages, and his business be totally destroyed.

37 H.

Complainant further avers that by the negligent, wrongful and illegal acts aforesaid, of the City of Newport News, a portion of his oysters and oyster planting ground has been taken and destroyed, to the great damage of your -plainant's property and business and the residue will shortly be taken and destroyed, unless an injunction shall issue from this Honorable Court.

I.

Complainant charges that the taking and destruction of his oysters and oyster planting ground aforesaid, and the Act of the Legislature of Virginia authorizing (if it be deemed to authorize) the taking of his oysters and oyster planting ground, is in violation of the Constitution of the State of Virginia and especially of Sections 11 and 58.

J.

Complainant further charges that the act of taking and depriving him of his oysters and oyster planting ground as aforesaid, and the Act of the Legislature of Virginia, authorizing (if it be deemed to authorize) the taking and destruction of his oysters and oyster planting ground, is in violation of the Constitution of the United States, in that it deprives your complainant of his property, without due process of law, and denies your complainant the equal protection of the law. The protection of the provisions of said Fourteenth Amendment to the Constitution of the United States is hereby invoked by your complainant.

The premises considered, and inasmuch as your complainant is remediless, save by the aid of a Court of Equity, wherein such matters are alone cognizable, he prays that the said City of Newport News, a municipal corporation, be made a party defendant to this suit, and required to answer the same fully and truthfully, but not on oath, which *us* waived; that proper process issue and all necessary orders and decrees be entered; that an injunction issue from this Honorable Court restraining the said defendant from emptying the said sewage into Salter's Creek, or that the said sewage be purified or otherwise rendered harmless before it is empt-ed into the said Creek;

38 or should this Honorable Court deem it proper to give the said defendant a reasonable time in which to construct the necessary plant or works incident to a purification of said sewage *than* your complainant prays that an injunction may issue to become effective (if necessary) at the expiration of such time as your Honor may deem reasonable; that an order of reference may be granted to ascertain the damage already sustained by your complainant; that the taking and destruction of complainant's oysters and oyster planting ground by the City of Newport News, as hereinbefore stated, and any act of the Legislature of Virginia attempting to authorize same be declared in violation of the Constitution of the State of Virginia and the Constitution of the United States; and that he may have such other further and general relief as the nature of his case may require, or to equity may seem meet. And he will ever pray, etc.

FRANK W. DARLING.
By COUNSEL.

J. WINSTON READ &
JONES & WOODWARD,
Attys.

A paper attached to said Amended and Supplemental bill is in the following words and figures, to-wit:

FRANK W. DARLING

vs.

CITY OF NEWPORT NEWS.

Complainant requests leave further to amend his bill by inserting in the second paragraph, on page eight, after the words "Salters Creek," the words "a non-navigable stream," and at the foot of page nine, the following paragraph:

"A charge of Twenty Dollars ($20.00) per lot for each lot 25x100 feet, is made by the said City against the owner of each lot, for the privilege of connecting with the sewers in said City, and the fees so collected belong exclusively to the said City and are used for City purposes."

The Defendant's Demurrer and the grounds thereof to the
39 Complainant's bill and amended and Supplemental bill is as follows to-wit:

In the Circuit Court of the City of Newport News, Virginia.

F. W. DARLING

against

CITY OF NEWPORT NEWS.

This defendant, by protestation not confessing or acknowledging all or any of the matters and things in the complainant's bill and amended and supplemental bill contained, to be true in man-er and form as the same are therein set out, doth demur thereto, and for grounds of demurrer says:

1. That the tidal, salt navigable waters of Hampton Roads and James River, and soil beneath the same, are owned and held by the Commonwealth of Virginia in trust for all the people of the Commonwealth, and — not be granted, aliened, leased, devised or conveyed contrary to, against or to the detriment of the public interest and use thereof.

2. That the oyster land, in the said bill set out, and the waters above the same are owned and held by the commonwealth in trust for all the people, and can not be leased to the complainant against or in conflict with the interest of the public therein or thereto.

3. That the bill shows the defendant is a municipal corporation in the state of Virginia, and as such is charged with the duties of protecting the public health, and, of necessity, to construct sewers to carry away the sewage of said City, and to increase the same from time to time as necessity requires, and in performing this duty, it is within its lawful right to empty the same into the tidal, salt navigable waters of the commonwealth.

4. That the bill does not contain any allegation that the complainant is a riparian owner and as such his property on the shore is affected thereby.

5. There is no allegation in the bill of any obstruction to navigation, or that offensive *orders* are given off from the waters above the lands leased by the complainant.

40 6. That the City was acting within its rights, powers and duties in constructing an outlet for its sewer beyond the city limits.

7. That this plaintiff can not be heard to complain in this proceeding that the city is exceeding its charter powers.

8. There is no allegation of defective construction or careless and negligent maintenance and operation of its sewer system, but the sole complaint is in the selection of the plan of its sewage system, in which the city acts in a legislative or quasi judicial capacity which acts are not reviewable by the Courts.

9. That the allegations of the bill do not show that the public is

using private property for public use, but on the contrary public property for public use.

10. That the bill shows that the sewage of Newport News is carried to sea—its natural receptacle—before any damage is alleged to have been done to the plaintiff's oyster land, and any injury is damnum absque injuria.

11. That the court will take judicial cognizance of the geographic location of Hampton Roads, Salter's Creek and the City of Newport News, and town of Kecoughatan and of section 13 of the general oyster laws of 1910, withholding that land from lease for oyster purpose, as lying in front of and adjacent to the defendant city.

J. A. MASSIE,
City Atty. p. d.

And now at this day, to-wit: (being the day and year first herein written). At a Circuit Court continued by adjournment, and held for the City of Newport News, at the Court-house, thereof, on Wednesday, the 27th day of September, in the year one thousand nine hundred and sixteen.

FRANK W. DARLING

vs.

CITY OF NEWPORT NEWS.

This cause came on this day to be heard upon the papers formerly read, herein, and the amended and supplemental bill filed by
41 the complainant, and the demurrer thereto, with the grounds thereof set out in writing, heretofore filed and the Joinder of the complainant therein and thereupon the complainant asked leave to further amend the said amended and supplemental bill by inserting in the second paragraph on page eight of said bill, after the words "Salters Creek," the words, "a non-navigable stream," and at the foot of page nine, the following paragraph, "A charge of twenty dollars ($20.00) per lot for each lot 25 x 100 feet, is made by the said City against the owner of each lot, for the privilege of connecting with the sewers in said City, and the fees so collected belong exclusively to *to* the said City and are used for City purposes" to which amendments counsel for the defendant objected for the reason that the Court will take judicial cognizance that the first amendment is not a fact because Salters Creek is and always has been a navigable stream, in which the tide ebbs and flows; and objected to the second amendment because the rates for connecting with the sewers of the City of Newport News are fixed by ordinance, a public record at twenty dollars per four-inch connection and not at twenty dollars for each lot twenty-five by 100 feet; and objection further to both amendments upon the ground of their immateriality and was argued by counsel. Upon consideration whereof, the Court doth permit and allow the said complainant to further amend his said amended and supplemental bill as above recited. The Court being of opinion that

the demurrer should be sustained by reason of the decision of the Supreme Court of Appeals in the case of the City of Hampton against Watson (which over-ruled the opinion of this Court in that case, and which is contrary to the views of this Court in this case) doth adjudge, order and decree that the order heretofore entered overruling the demurrer to the original bill be vacated and set aside and that the demurrer to the original bill and amended and supplemental bill be sustained and that the bills be and they are hereby dismissed and that the defendant recover of the plaintiff its costs about its defense in this behalf expended. And the plaintiff having expressed a desire to apply to the Supreme Court of Appeals or some Judge thereof for an appeal and supersedeas in this case, it is ordered that execution of this decree be suspended for a period of ninety days from the adjournment of this Court in order to enable the plaintiff to have the record in this case copied and submitted to the Supreme Court of Appeals or some Judge thereof in vacation; but before this suspension order shall take place, the complainant or some
42 one for him shall enter into a bond *without* security approved by the Clerk of this Court in a penalty of $100.00 and conditioned as the law directs.

STATE OF VIRGINIA,
City of Newport News, To wit:

I, D. G. Smith, Clerk of the Circuit Court of the City aforesaid, in the State of Virginia, do hereby certify that the foregoing is a true transcript of so much of the record and proceedings as are required by law (no particular parts of the record being specially required to be copied by either party in writing), in a certain chancery cause lately depending in the said Circuit Court, between Frank W. Darling, Complainant and City of Newport News, a municipal corporation, Defendant. And I further certify that notice of the application for this transcript of record has been duly given as required by law and that said notice has been filed with the papers of said cause in the clerk's office of the Circuit Court aforesaid. Given under my hand this 16th day of October, 1916.

D. G. SMITH, *Clerk*,
By R. E. MARABLE,
Deputy Clerk.

Fee of Clerk of Circuit Court of Newport News, Va., $8.75.

A Copy—Teste:
H. STEWART JONES, *C. C.*

43 *Opinion by Judge Robert R. Prentis.*

Wytheville, Va., June 13, 1918.

Circuit Court of City of Newport News.

FRANK W. DARLING

v.

CITY OF NEWPORT NEWS.

The appellant filed his bill against the appellee, basing his claim for relief upon the fact that he is the lessee from the State of very valuable oyster planting grounds located in Hampton Roads, on the northern side thereof near the city of Newport News, and that a considerable portion thereof has already been damaged and the oysters thereon polluted because of the sewer system of the city, which conducts sewage into Salter's creek and thence into the tidal waters of Hampton Roads, across the appellant's oyster beds, and that other and greater damage therefrom is probable. To this bill the appellees filed a demurrer, which the lower court sustained because of opinion that the case of Hampton v. Watson, 119 Va. 95, is controlling upon the main question involved.

In this conclusion of the trial court we concur. The syllabus of that case fairly states the conclusions of this court as follows:

44 "1. There is a marked and well defined distinction between the pollution of a small non-navigable stream, and the pollution of large tidal navigable bodies of salt water, for the reason that in the first case the bed of the stream and the waters are owned by the riparian owners while in the latter case the bed of the navigable, tidal salt water and the waters themselves are owned and controlled by the State, for the use and benefit of all the public, subject only to navigation. It is for the State to say what uses shall be made thereof and by whom, subject always to the right of the public, and for the State, through the legislative branch of the government, to say how much pollution it will permit to be emptied into and upon its waters, so long as the owners of the land between low water and high water mark are not injured.

"2. A municipal corporation situated on an arm of the sea, adjacent to tidal waters, has the right to use such waters for the purpose of carrying off its refuse and sewage to the sea, so long as such use does not create a public nuisance, and any injury occasioned thereby to private oyster beds is damnum absque injuria."

45 Additional authorities to those cited in City of Hampton v. Watson, supra, (all relating, however, to the Federal government), to the effect that the power of the sovereign State or nation is perpetual, not exhausted by one exercise, and that all privileges granted in public waters are subject to that power, the exercise of which is not the taking of private property for public use, but

only the lawful exercise of a governmental power for the common good, are: Scranton v. Wheeler, 179 U. S. 141, 45 L. Ed. 126; Greenleaf Johnson Lumber Co. v. Garrison, 237 U. S. 251, 59 L. Ed. 939; Willink v. U. S. 240 U. S. 572, 60 L. Ed. 808; State v. Cleveland &c. Ry. Co. 113 N. E. (Ohio) 677, L. R. A. 1917-*a*, p. 1014.

The appellant relies upon Huffmire v. Brooklyn, 162 N. Y. 584, 57 N. E. 176, 48 L. R. A. 421, and this case appears to sustain his contention, though it is observed that the New York statute, under which the owner of the oyster bed claimed there, provided that he should have "the exclusive property in the oysters so planted and the exclusive use of such oyster beds;" while the Virginia statute employs different language and provides that the oyster beds may be occupied "for the purpose of planting or propagating oysters
46 thereon," and that so long as the rent is paid annually in advance the State will guarantee to the renter for twenty years, "the absolute right to continue to use and occupy such grounds, subject only to the right of fishing in the waters above the said bottom." Secs. 6 and 9, General Oyster Law, Acts 1910, p. 543.

In Seaman v. New York, 161 N. Y. Supp. 1002, the pollution of tidal waters by sewage is held damnum absque injuria, as to a riparian owner who had his oysters, over which, while stored in his cellar, the polluted waters of Jamaica Bay ebbed and flowed.

The authorities upon the general subject are collected and summarized in the note to Winchell v. Warkesha, (Wis.), 84 Am. St. Rep. 921, and in 9 R. C. L. 682.

Grants in derogation of the common or public right are always strictly construed against the grantee. Nothing passes except what is granted specifically or by necessary implication.

As Mr. Justice Shiras states the rule in his dissenting opinion in the case of Illinois Central R. Co. v. Illinois, 146 U. S. 468, 36 L. Ed. 1048: "It must be conceded, in limine, that, in construing this grant, the State is entitled to the benefit of certain well settled
47 canons of construction that pertain to grants by the Sate to private persons or corporations, as, for instance, that if there is any ambiguity or uncertainty in the act, that interpretation must be put upon it which is most favorable to the State; that the words of the grant, being attributable to the party procuring the legislation, are to receive a strict construction as against the grantee; and that, as the State acts for the public good, we should expect to find the grant consistent with good morals and the general welfare of the State at large and of the particular community to be affected."

Applying this rule to the grants made under the Virginia Oyster Law, we find that the lease is made only "for the purpose of planting and propagating oysters thereon," and it is for this purpose alone that the planter is authorized to use and occupy such ground—that is to say, that while any citizen might have taken oysters therefrom before the grant, afterwards he only may do so, and all others are excluded from either planting or taking oysters from such ground during his term: this marks the limit of his right, for there is nothing to indicate that any other public or private right is withdrawn.

limited or curtailed. He does not take a fee simple title,
48 nor can he use the property for any other purpose except for that stated in the statute, and hence every other right theretofore in the public is preserved. Nor is there any language in the statute indicating any intent to destroy or impair any of the ancient rights of the riparian owners.

In Prior v. Swartz, (Conn.), 18 L. R. A. 668, it is expressly decided that the right of the riparian owner to build wharves and dig channels to connect his high land with navigable waters is superior to the right of the oyster planter. This right of the riparian owner to build wharves is everywhere recognized. Miller v. Mendenhall, 43 Minn. 95, 19 Am. St. (note) 231; Norfolk City v. Cooke, 27 Gratt. (68 Va.) 435.

It is a matter of common knowledge and, therefore, must have been within the contemplation of the general assembly when the law was enacted, that there are vast areas of land in the tidal waters of Virginia remote from the centers of population and suitable for oyster culture. Hampton Roads (in which the appellant occupies 1,800 acres of oyster-planting ground, of which 100 acres *is* alleged to be polluted) is a large, tidal, navigable body of salt water,
49 formed by the confluence of the waters of the Atlantic Ocean, Chesapeake Bay, the James, Elizabeth and Nansemond rivers, Hampton creek, and other smaller streams. That some of its waters have been long polluted and unfit for the planting of oysters for human food is also apparent from City of Hampton v. Watson, supra. Upon its shores, or closely adjacent thereto, are the cities of Norfolk, Portsmouth, Newport News and Hampton, the towns of Phœbus and Kecoughtan, and great railway terminals and coaling stations. There is also the large population at Fortress Monroe, the National Soldiers' Home, and in fact along the entire adjacent coast. There the Federal Government has recently located large military and naval stations, and is building an immense freight terminal for military purposes. Upon its waters innumerable ships of war and commerce, domestic and foreign, constantly float. From all of these sources the waters of Hampton Roads are constantly subject to pollution and contamination such as is necessarily incident to all such roadsteads. This large population is destined still further to increase, and hence the probable sources of contamination will be increased.

50 If it be true that the private right of the appellant to continue to use and occupy this territory for the planting of oysters has been so guaranteed by the State as to make his rights superior to the interest of the large public otherwise entitled (within proper limits) to use the waters of Hampton Roads for its sewage, then the burden is clearly upon him to show that this is true. Until this is shown, it is unnecessary to discuss the proposition so urgently and well presented in the dissenting opinion—that is, that the general assembly possesses unlimited power to grant absolute property rights in the lands of the State lying under the tidal waters.

That the right claimed by the city clearly existed before the enactment of the oyster law cannot be doubted, and the legislature

cannot be presumed to have intended to destroy this ancient and undoubted public right in the absence of a clear and explicit statute indicating such purpose. We think the more reasonable view of the statute is that it was not conceived that it would be thought desirable to continue the plant oysters in an area so certain ultimately to be polluted, and so likely upon inspection by the Federal and State authorities to be condemned as unsuitable for that
51 purpose.

This construction is not, as the dissenting opinion suggests, the substitution of the will and judgment of this court for the will and judgment of the legislature, but on the contrary ascertains and declares the true meaning of the statute in accordance with the will and judgment of the general assembly, which not only seeks to encourage oyster culture, but has also expressly authorized cities and towns to construct sewers within or without their limits. Acts, 1908, p. 642. This conclusion effectuates both of these purposes. The bill seeks to deny to the city of Newport News a privilege which is freely exercised by every ship which sails on these waters, and except as restrained by local law, by every individual on these shores.

Under the Virginia statute, then, as construed by this court, the oyster planter takes his right to plant and propagate oysters on the public domain of the Commonwealth in the tidal waters, subject to the ancient right of the riparian owners to drain the harmful refuse of the land into the sea, which is the sewer provided therefor by nature; while another statute (Acts 1916, p. 51) provides for the examination of such oyster-planting grounds so as to discover
52 polluted areas, and prohibits the taking of oysters therefrom except for the purpose of removing them to unpolluted waters, there to remain until cleansed, purified and made suitable for human food.

Affirmed.

53 FRANK W. DARLING

v.

CITY OF NEWPORT NEWS.

Dissenting Opinion by Sims, J.

The decision of this case, so far as the right of recovery of damages is concerned, turns upon the question whether the appellant had a private right of property in the oysters upon or in the oyster planting ground in the bill mentioned.

If such property right existed the city of Newport News, a municipal corporation, had no right to damage or destroy such property by what would have been a private nuisance at common law if created by a private person. 1 Farnham on Waters, sec. 138-*b*, 138-*c*, 138-*d*; Gould on Waters, sec. 345-6; Joyce on Nuisances, sec. 284.

Under the Constitution of Virginia of 1902, sec. 581, the legisla-

tive authority of the city does not shield it from liability to make "just compensation" for "damage" it may cause to private property by acts since that Constitution went into effect which would have created a private nuisance at common law although such property be not "taken." 1 Farnham on Waters, sec. 138-*d*; note to 48 L. R. A. 691, 698 *at* seq.; Swift & Co. v. Newport News, 105 Va.
54 108, Rigney v. Chicago, 102 Ill. 64; 1 Lewis on Em. Domain (3d Ed.), secs. 16 to 61; 108, 346, 356, 360-1.

As said in the syllabus to Hampton v. Watson, 119 Va. 85: "There is a marked and well defined distinction between the pollution of a small non-navigable stream and the pollution of large tidal navigable bodies of salt water;" but this distinction, as also stated by such syllabus exist- only "for the reason that in the first case the bed of the stream and the waters are owned by the riparian owners, while in the latter case the bed of the navigable, tidal salt water and the waters themselves are owned and controlled by the State. * * *" With respect to private exclusive rights of ownership which may be and have in fact been acquired from the Commonwealth there is no distinction between the liability in damages for a pollution injuriously affecting such private property rights in tidal navigable salt waters and the beds thereof, and for a pollution so affecting private property rights in small non-navigable streams.

Now it is undoubtedly true that the private rights of ownership which may be acquired and held in tidal navigable waters and the beds thereof, must be acquired from the Commonwealth and
55 must be held subject to such regulations as it may prescribe for the protection of the public interest. It is also true, as said in Hampton v. Watson, 119 Va. at pp. 98-9, "* * * the tidal navigable salt waters and the beds thereof belong to the Commonwealth, in a sovereign capacity, for the benefit of all the public and cannot be disposed of to the detriment of the public interest." Citing a number of authorities. But who is to decide whether a disposition of such subject in any particular instance is in detriment of the public interest, and what interest has the public in the subject? These are different questions, which will be hereinafter considered.

And it is unquestionably true that in the absence of such exclusive private property rights, acquired from the Commonwealth, the pollution of such waters and the beds thereof by sewerage discharged therein or thereon by private persons, corporations or municipalities, whether under legislative authority or without, cannot create a common law nuisance, so long as only such waters and bed- thereof are affected, since the rights of riparian owners in such case would not be affected. But, as is also said in the opinion of the court in the case last cited, referring to the holding in Illinois Central R. Co. v. Illinois, 146 U. S. 387, 13 Sup Ct. 110,
56 36 L. Ed. 1018, such sovereign ownership in the Commonwealth is held, "* * * with the consequent right to use *or dispose of* any portion thereof when that can be done without substantial impairment of the interest of the public in the waters." (Italics supplied.)

Now it is settled beyond all controversy that exclusive private rights of ownership in such waters and in the beds thereof, consisting of exclusive rights of fishery, namely, of shell fishery, (being the precise rights which were acquired by appellant in the instant case from the Commonwealth), may be acquired from the Commonwealth, and that such disposition of a portion of the sovereign ownership by the latter is not such an impairment of the interest of the public in the waters and beds thereof aforesaid as to prevent such disposition being valid and effectual to vest in private persons such property rights. 2 Farnham on Waters, sec. 370, 402.

As said by the latter learned author in said section 370 above cited: "Rights of legislature to grant exclusive rights in tidal water. When the American colonies separated from the mother country and acquired their freedom, they acquired all the powers, not only of the Crown, but of Parliament also, and, unless restricted by the Constitution, this power resides in the legislatures.

57 Parliament, in England, always had the right to grant exclusive fishery rights in tidal water. Queen v. Robertson, 6 Can. S. C. 52. And that power rests in the legislatures, except where it is withdrawn from them by the Constitutions. Com. v. Weatherhead, 110 Mass. 175; Rowe v. Smith, 48 Conn. 444; Chalker v. Dickinson, 1 Conn. 382, 6 Am. Dec. 250; Martin v. Waddell, 16 Pet. 367, 369, 10 L. Ed. 997, 998; Den ex dem. Russell v. Jersey Co., 15 How. 432, 14 L. Ed. 760; Woodey v. Campbell, 37 N. J. L. 163; Carter v. Tinicum Fishing Co., 77 Pa. 310; Shreeves v. Diveson, 2 N. J. L. 247; Munson v. Baldwin, 7 Conn. 168; Walker v Stone, 17 Wash. 578, 50 Pac. 488; Halleck v. Davis, 22 Wash. 393, 60 Pac. 1116; Com. v. Hilton, 174 Mass. 29, 45 L. R. A. 475, 54 N. E. 362. And when grants to private individuals have been made, they are valid and will be upheld; so that there may be a several fishery in a tidal water. Fitzgerald v. Faunce, 46 N. J. L. 596; Den ex dem. Bispham v. Rice, cited in Gough v. Bell, 22 N. J. L. 463." As stated in note 2 to such section: "Public fisheries may be leased and disposed of by the legislature in any manner so that it does not interfere with or impair the public right of navigation or the power of the general government to regulate commerce and navigation in bays and harbors. Gough v. Bell, 21 N. J. L. 156."

58 In section 402 above cited, the same learned author last quoted says: "Public right in shell fisheries. * * * This right is subject to * * * grants from the public which has placed the title to the beds in private ownership. Peck v. Lockwood, 5 Day 22; Martin v. Waddell, 16 Pet. 367, 10 L. Ed. 997; Parker v. Cutler Mill Dam Co., 20 Me. 353, 37 Am. Dec. 56; Bagott v. Orr, 2 Bos. & p. 472; Paul v. Hazelton, 37 N. J. L. 106; Moulton v. Libbey, 37 Me. 472; 59 Am. Dec. 57; Weston v. Sampson, 8 Cush. 347, 54 Am. Dec. 764; Proctor v. Wells, 103 Mass. 216 * * * The shell fisheries may be granted to private individuals so as to exclude the public right of fishing there. Com. v. Manimon, 136 Mass. 456."

And on principle this must necessarily be so with us. For the sovereign power of the legislature is unlimited save only as it may be

limited by the State Constitution or by the grant of powers to the Federal government resulting from the Federal Constitution; and when neither State nor Federal Constitution contains any provision limiting the legislative power to grant a private right of fishery (such as held by the appellant in the case before us under grant (lease) from the legislature), in tidal navigable salt waters
59 and the beds thereof, for the courts to say that such legislative power is limited by a rule that the private right so granted shall not interfere with the public use of such waters and beds thereof for the discharge of sewage, is for the judicial branch of the government to usurp the function of the Constitution (States and Federal) and to attempt to impose a limitation upon the sovereign power of the legislature. The bare statement of the proposition is sufficient to refute the contention that such a limitation upon the legislative power exists with us or can be imposed by the courts.

In England, the Crown had not the same plenitude of power to grant exclusive private rights of fishery in tidal navigable salt waters and beds thereof, at least not after Magna Charta, so as to interfere with the public use of such waters and beds thereof, but it would serve no useful purpose to attempt here the difficult task of delving into ancient rules of the common law which hedged about the power of the Crown when attempting to be exercised without the consent of Parliament in matters affecting the jus publicum, since the power of our legislature is not measured by the power of the Crown
60 in England. It should be noted, however, that in the consideration of this subject it must be constantly borne in mind that much which is found in the books (of text-writers and of decisions) with respect to the inalienable nature of the jus publicum has its origin in the common law doctrine touching the limitations above alluded to upon the power of the Crown and has no correct application to the legislative power in the premises.

In truth, aside from the public right of navigation, which falls within the control of the Federal government as a result of the grant of powers to the latter by our Federal Constitution, there is no jus publicum, or public right, or public interest in tidal navigable salt waters or the beds thereof, except such right or interest as the public is permitted to enjoy by legislative sufferance or legislative grant. And this is true of municipalities, other corporations, public or private and of private persons composing the public. They have no vested rights in the premises which the legislature cannot take away. Such rights are subject at all times to the control of the legislature, since we have no constitutional limitation on the subject as aforesaid. 2 Farnham on Waters, sec. 370, p. 1375.

61 All rights claimed by municipalities, and by all other persons, corporate or individual, to use such waters or beds thereof for any purpose must be derived from the Commonwealth, by sufferance or by legislative grant. They can have no other source of origin. As to origin, they differ not at all from all titles and rights of ownership and of use of lands above tidewater. The pri-

vate right or title to all such things is derivative from one and the same source alone,—the Commonwealth. (See McCready v. Com., 94 U. S. 391, supra, 24 L. Ed. at p. 249, for reference to this principle if reference be needed.)

If, therefore, (as in the case before us) the Commonwealth acting through the legislature, makes a grant (or lease) of an exclusive private right of fishery in tidal navigable waters and beds thereof to an individual (the appellant), that is but an exercise of the sovereign power of the Commonwealth to do what it may will with its own—no constitutional limitation existing forbidding it so to do. By that grant (or lease) the Commonwealth takes away from other individuals and corporations, (municipal and others), the
62 privilege they may have theretofore enjoyed of using such waters and beds thereof by sufferance of the Commonwealth. They had no vested right in such use. It was a privilege merely, just as soil above tidewater belonging to the Commonwealth may be used in common by all or any of its citizens, until there is a private grant thereof from the Commonwealth. Upon such private grant issuing in pursuance of legislative enactment, the public use in common must cease.

The foregoing assumes, of course, that the private grant (or lease) of exclusive right of fishery to the individual instanced is a prior grant (or lease)—as in the case before us. In such case if another (a municipal corporation, such as the appellee, for instance) were (since the Constitution of Virginia of 1902 went into effect) to evade such private right of fishery under express legislative authority, such authority would be null and void under section 58 of Constitution of Virginia, 1902, forbidding the legislature to authorize the taking or damaging of private property for public use without just compensation.

Section 1338 of the Code of Virginia is declaratory of the
63 common law rights of sovereignty of the Commonwealth of Virginia aforesaid pertaining to this subject and specifically refers to its rights "by special grant" to withdraw from the use "in common by all the people of the State" portions of "the beds of the bays, * * * and shores of the sea within the jurisdiction of this Commonwealth" and to vest exclusive rights of property in such portions thereof in private persons, except that any grant of such exclusive private property rights was forbidden to be issued after such statute went into effect "in any natural oyster bed, rock or shoal, whether the said bed, rock or shoal shall ebb bare or not." Taylor v. Commonwealth, 102 Va. 759. The exception contained in such statute is merely a declaration of legislative policy by way of a self-imposed limitation of the sovereign right of the Commonwealth to "grant" and "pass any estate or interest of the Commonwealth" in such natural oyster beds, rock or shoal, in tidal navigable waters. (The right of fishery held by appellant *do* not include "any natural oyster bed, rock or shoal.") Accordingly the power of the legislature of Virginia to authorize by statute the leasing to private persons of oyster ground beneath the navigable tidal waters

64 within its jurisdiction has been uniformly recognized by the decisions of this court. And it has been uniformly held that such leases confer an "exclusive right (upon) the lessee to use and occupy the land" for the period of the lease. As said by this court in Powor & Kellog v. Tazewell, 25 Gratt. (66 Va.) 786, speaking of such a lessee: "It confers in fact an exclusive right to use, occupy or take the profits of the land by planting or sowing oysters upon it * * *." Such a private right of property is vested by such a lease in the lessee in the bed of the ground beneath the waters that the lessee (occupying the precise position as that occupied by the appellant) may maintain an action of unlawful detainer to recover the possession thereof. See to the same effect, Hurst v. Dulaney, 84 Va. 701; Mears & Lewis v. Dexter, 86 Va. 834. Such a grant of exclusive private property right is not in violation of the power of the congress to regulate commerce under the Federal Constitution, and such a grant confers a property right. McCready v. Commonwealth, 94 U. S. 391, 24 L. Ed. 248. The existence of such property rights is also recognized by statute in Virginia. Section 2531, Code of Va., provides that "the interest in said oyster planting
65 grounds shall be construed to be a chattel real and shall at the death of the renter pass into the hands of his personal representative for the benefit of the creditors and heirs of the defendant, etc."

Therefore, as against the private property rights of appellant, acquired in pursuance of statute of the Commonwealth of Virginia, the act of the appellee complained of created what would have been at common law a private nuisance if created by a private person, and for which the appellee is liable to appellant in damages to the extent of making the "just compensation" required by section 58 of the Constitution of 1902 of Virginia. Huffmire v. Brooklyn, 162 N. Y. 584, 48 L. R. A. 421. As said in the latter case:

"The plaintiffs contend that the casting of noxious and destructive substances upon their oyster bed was not a consequential but a direct injury. The defendant insists that the discharge of the sewer in question into the waters of Mill Creek is simply the consequential result of obedience to the legislative mandate, and that, in the absence of negligence on the part of the municipal authorities
66 in the construction and operation of said sewer, the defendant is not liable. Applying the rule which the defendant invokes in all its force and breadth, we think this case falls directly within the constitutional inhibition against the taking of property without compensation. The plaintiffs were lawfully in possession of a piece of land under water upon which they had planted a bed of oysters. They had their title under legislative authority, which was as ample and unquestioned as that under which defendant's sewer was constructed. Although this land was under public waters, it was as much the private property of the plaintiffs as though it had been a tract of farm land held under a lease from the town of Flatlands under legislative authority. The act of the defendant in pouring its sewage upon this land was not consequential. It was as

direct as though it had been discharged upon a piece of land owned or rented by the plaintiffs, and used for farming or gardening purposes. In the latter case a municipal corporation could not successfully defend its trespass because it was acting under legislative authority, or because its sewage had been carried to the lands of the person complaining over the lands of others. The fact that
67 plaintiffs' land was under public water, and that defendant's sewage was discharged upon it, after passing through 500 feet of public water, the land under which was not in possession or control of the plaintiffs, does not differentiate this case in principle from the illustrative case of a discharge of sewage upon surface lands. In either case the injury is so direct as to amount to an invasion of a private right, which no legislative sanction or direction can justify or excuse. These views are, we think, sustained by abundant authority."

The Constitution of the State of New York contains no provision requiring compensation to be paid for private property "damaged" for the public use, such as the Constitution of Virginia, 1902, sec. 58, but only such a provision as to the "taking" of private property. But under the view taken by the New York courts of the subject (also taken in Massachusetts, and in a few other jurisdictions) a physical invasion of private property as the result of public use is held to be a "taking" within that constitutional provision. It is true that in Virginia, prior to its Constitution of 1902, a stricter rule obtained and nothing short of an actual "taking" of private
68 property for public use was held to come within the former constitutional provision in this State on the subject, which, like the New York Constitution, required compensation to be made only for a "taking" of private property for public use. Hence, indeed, the amendment of our Constitution in 1902, adding in section 58 thereof the words "or damaged." Debates Const. Convention, 1901-2 p. 697 et seq.

Therefore, the case of Huffmire v. Brooklyn, supra, is directly in point as to what the holding in this case before us should be under our present Constitution.

The appellee relies upon the cases of Hampton v. Watson, supra; Seaman v. New York, 161 N. Y. Supp. 1002; Savre v. Newark, 45 Atl. 985 48 L. R. A. 722; Doremus v. Paterson, 55 Atl. 304; Marrifield v. City of Worcester, 110 Mass. 216, 14 Am. Rep. 592; Haskell v. New Bedford, 108 Mass. 208-214; Grey v. Paterson, 83 Am. St. Rep. 642. But in these cases either there did not exist in the plaintiff any property right acquired from the Commonwealth, or if it did, it was not "taken" or "damaged" by the acts complained of, within the meaning of the constitutional provision on the
69 subject.

In the Hampton v. Watson case, supra, it is true that the opinion of this court rested the decision upon the ground that "the beds and waters of Hampton Creek * * * (in question in that case) * * * being tidal, navigable salt waters, are held in trust by the State of Virginia for the public and cannot be granted

to an individual so as to impair the public interest therein, or the use thereof."

But the public use of such beds and waters which the court had in mind and of which it was speaking in that case was a use which long prior to the institution of plaintiff's action in 1915 had taken actual possession of such beds and waters as a dumping ground for the discharge of sewerage to the extent of completely polluting the ground of plaintiff so that it was unfit for his purpose before his action was instituted. The facts in that case were that long prior to the institution of the plaintiff's action in 1915, to-wit, in 1899-1900, the city of Hampton constructed its sewer system and put it in operation, discharging into Hampton creek, and in 1908 made ad-
70 ditions thereto and put same in operation having the same place of discharge. And this was not all. From a time prior to 1908 there were private sewer systems emptying into the same place established by the County Poor House, the National Soldier's Home, with over three thousand inmates, the Normal School, with eleven hundred inmates, and other private sewers and closets, which were not connected with any sewer of the defendant city and which continuously drained and emptied directly into Hampton Creek. And, as said in said opinion: "The evidence shows that the sewerage from these private sources is many times more than sufficient to pollute the waters in question, so as to forbid the sale of oysters directly therefrom." As also stated in such opinion: "It further appears that in the summer of 1909, the oysters planters in Hampton creek were notified by the health officer of the county that those waters were too polluted to permit the sale of oysters therefrom, and again in 1914, the United States health authorities made an examination and found that the waters were too polluted for oysters to be sold directly therefrom, and thereupon the Pure Food and Dairy Department of the State of Virginia notified the defendant in error, among others, that it would not be permitted to sell *their* oysters without first transplanting them to
71 unpolluted waters."

In that case the plaintiff's right to maintain his action necessarily depended upon his having *has* an exclusive private right of ownership—an exclusive private right of fishery—in the tidal waters and beds thereof in question as of the time his alleged cause of action arose. Plainly under the facts of that case he did not have such exclusive private property right at the time his alleged cause of action arose, since the city of Hampton, by its sewer system established and begun in operation in 1899-1900 and enlarged in 1908, certainly by 1914, (five years having expired after the injury therefrom began) had acquired a statutory right to discharge its sewerage in the locality in question. Va. Hot Springs Co. v. McCray, 106 Va. 461, 56 S. E. 216, 10 L. R. A. (N. S.) 465, 10 Ann. Cas. 179; Southern Ry. Co. v. McMenamin, 113 Va. 121, 73 S. E. 980; Magruder v. Va. Carolina Chem. Co., 120 Va. 352. The Hampton v. Watson case, therefore, presented the question whether a plaintiff claiming an exclusive private right of fishery under grant (lease) from the Commonwealth which he had lost, by reason of the

bar of the statute of limitations, before he instituted his
72 action, because of public use in conflict with such private right, could yet maintain his action. That was a very different question from the one presented in the instant case, where the appellant held and owned at the time his alleged cause of action arose an exclusive private right of fishery under grant (lease) from the Commonwealth which he had not lost before he instituted his action.

What is said, therefore, in the Hampton v. Watson case should be construed in the light of the facts of that case.

Moreover, as said in Williams Printing Co. v. Saunders, 113 Va. 156, at p. 179: "* * * the value of a case as a precedent is affected by the consideration that the precise point for which it is relied upon as authority was presented in argument and considered by the court." It seems that in the Hampton v. Watson case the point was not presented in argument that by the provision of section 58 of the Constitution of Virginia of 1902, the authority of the legislature to authorize a municipality to damage private property for public use without just compensation was taken away, so that the damnum absque injuria rule applied by the court in that case should not have been applied. Certainly, that point was not
73 considered by the court, as appears from the opinion. Therefore, for this reason also, the Hampton v. Watson case should not be considered as decisive of the instant case. But if that case can be construed to apply to the instant case, it can only be upon the ground that it holds that an exclusive private right of fishery cannot be granted by the Commonwealth. Such a holding would be unsound because in conflict with the principle of law involved and the settled law on the subject, as above noted. Hence, I am of opinion that the Hampton v. Watson case cannot properly rule the instant case.

In Seaman v. New York, supra, the plaintiff had no property right which he had acquired of the Commonwealth in the tidal water in question, nor in the bed thereof.

In Sayre v. Newark, supra, there was no private property right in the bed of the stream acquired from the Commonwealth nor was there any "taking" of the property right in question. It was merely a riparian property right which was "damaged." The Constitution of New Jersey contains no provision against private property being "damaged" for public use without just compensation, but only such provision as to a "taking" of private property for public use.
74 In New Jersey the construction of the latter provision by its courts is the same as the Virginia doctrine on that subject before our Constitution of 1902. Hence that case is not authority in point on the question under consideration under the latter constitution.

In Doremus v. Paterson, supra, the stream affected by the pollution was above tidewater, and the plaintiff had acquired no property right in the water in question.

In Merrifield v. City of Worcester, supra, the property right affected was a riparian right only, not a right in the bed of the

stream. The court remarked that it was not an "acquired property right in possession." However, that case is to some extent distinguished by a holding of the court somewhat peculiar to Massachusetts (1 Farnham on Waters, sec. 138-c); and, further, it rests upon an application of the doctrine of damnum absque injuria which has not been sanctioned in Virginia. Arminius Chem. Co. v. Landrum, 113 Va. 7.

In Haskell v. Bedford, supra, among the plaintiff's property rights was one which he had acquired from the Commonwealth,
75 and that was a title to the channel of the river underneath tidewater, by virtue of a certain statute of the State of Massachusetts. As to that right the court in its opinion says: "But the right conferred upon the city of New Bedford to lay out common sewers 'through any streets or private lands' does not include the right to create a nuisance, public or private, upon the property of the Commonwealth, or of an individual, within tidewater. Hale de Nortibus Maris, c. 7, in Hargr. Law Tracts, 85; Boston v. Richardson, 19 How. 263, 270, and 24 How. 188, 193; Proprietors of Locks & Canals v. Lowell, 7 Gray 223; Sherman v. Tobey, 3 Allen 7; Attorney-General v. Birmingham, 4 Kay & Johns. 528; Attorney-General v. Leeds, Law Rep., 5 Ch. 583." And the court held that the city, notwithstanding its legislative authority to establish its sewers as it did, discharging into the bed of the channel of the said river, was liable in damages to the plaintiff for the injury done him by the accumulation of sewerage in such river bed below tidewater, and filling it up, that being a private nuisance, and reversed the court below on this point for holding to the contrary. See pp. 214, 215 and 216 of the report of that case in 108 Mass.
76 Indeed the court in that case went further and held that, "against the continuance of such a nuisance, if clearly proved, equity will also grant relief by injunction," citing a number of cases. See Idem, p. 216.

In Grey v. Paterson, supra, the plaintiffs at whose relation the suit was brought were riparian owners, and those whose lands bordered on the river at tidewater had acquired no property right in the tidal waters or beds thereof, such right still remained in the Commonwealth.

There is nothing in the cases of Taylor v. Commonwealth, 102 Va. 768; N. N. S. B. & D. D. Co. v. Jones, 105 Va. 503; Ill. Cent. R. Co. v. Illinois, 146 U. S. 387, 36 L. Ed. 1018, or Coxe v. State, 144 N. Y. 396, 39 N. E. 400, cited in the opinion of this court in Hampton v. Watson, supra, which is in any way in conflict with the holding in the case of Huffmire v. Brooklyn, supra.

It is true that in the opinion in the case of Coxe v. State just mentioned, there is a distinction sought to be made between the character of the title vested in the Commonwealth with respect to tidal navigable waters and the beds thereof and the character
77 of such title with respect to land above tidewater. But for the reasons indicated above, both on principle and upon authority, such a distinction cannot be sound. The opinion confuses the character of title vested in the Crown in England with

that vested in our American Commonwealths and attributes to the latter limitations which in truth have and can have no existence unless imposed by Constitution, State or Federal. A detail discussion of the authorities referred to in such case would make this even more manifest, but that would needlessly prolong this opinion, since what is said in Coxe v. State on the subject under consideration does not contravene the power of the legislature to grant an exclusive private right of fishery which does not interfere with the powers vested in the Federal government under the Federal Constitution to control navigation and regulate commerce. Such a grant even under the position taken in that case would be considered a reasonable exercise by the State of its legislative power and valid to vest exclusive private right of fishery, and hence such case is not in conflict with the case of Huffmire v. Brooklyn, supra.

What the case of Coxe v. State, supra, decided was, that
78 a legislative grant to a private individual or corporation to dyke off a part of the tidal navigable salt waters and fill in so as to reclaim the beds underneath such waters was void because in conflict with the Federal Constitution granting to the Federal government the exclusive power to regulate foreign and domestic commerce. There is nothing in that holding in conflict with either the Huffmire v. Brooklyn case or what has been said above on the fundamental principle involved.

That case also rests its decision on the ground that the act of the legislature in question was void under the New York State Constitution because it embraced more than one subject; but that ground is, of course, foreign to the subject we have under consideration and is merely referred to as further showing that the court did not rest its decision of the case upon the distinction sought to be made in its opinion as aforesaid with respect to the character of title vested in the Commonwealth to tidal navigable waters and the beds thereof.

There is nothing in the cases of Scranton v. Wheeler, Greenleaf Johnson Lumber Co. v. Garrison, Willink v. U. S., or State *of* Cleveland, cited in the majority opinion, in conflict with
79 what has been said above. Those cases concern the power of the Federal government under the Federal Constitution. They hold in effect, that no private property right in navigable waters and the beds thereof can be acquired or held as against the power of the Federal government to control navigation and regulate commerce, conferred upon the latter by the Federal Constitution.

I have no difference with the majority opinion on the subject that, as stated in such opinion, "Grants in derogation of the common or public right are always strictly construed against the grantee. Nothing passes except what is specifically granted, or by necessary implication." Illinois R. Co. v. Illinois, 146 U. S. 468, 36 L. Ed. 1048, cited in the majority opinion, and numerous other authorities which might be cited, so holding in effect. But after giving full force and effect to this rule, as we have seen from a consideration of the Virginia statute law on the subject, such statute law is free from all ambiguity and all uncertainty, and plainly and unques-

tionably has made the grant to the appellant of the exclusive right of fishery aforesaid, in the locality aforesaid, "for the purpose of planting and propagating oysters thereon." And such grant
80 was accepted by the appellant and he entered into the possession thereof before the appellee acquired any rights under the legislative grant of authority to it as a municipality to construct its new sewerage system and to discharge its sewerage therefrom, complained of by the appellant. The circumstance that the fee simple was not granted to the appellant seems to me to be wholly immaterial. Other property rights are just as sacred, may be of the same value and are just as much entitled to protection as are fee simple interests in property. The point is that exclusive private property rights were "specifically" granted to and derived by the appellant under legislative enactments of the Commonwealth of Virginia; and such rights were so acquired by the appellant before any conflicting rights were acquired by the appellee under its legislative authority. The new sewer and the discharge of sewerage therefrom, complained of by appellant, was not begun by appellee until 1907, after the Constitution of Virginia of 1902 went into effect. If prior to such Constitution the appellee had any legislative authority to discharge its sewerage to the damage of said private rights of appellant without liability to him in damages, such authority was annulled by
81 the provision of such Constitution (sec. 58) above referred to. Swift & Co. v. Newport News, supra (105 Va. 108) and other authorities cited above on this subject. Hence in 1907 and thereafter, when the appellee committed the acts complained of, creating what would be a private nuisance if created by an individual, the appellant's private property rights aforesaid were protected by such constitutional provision, and the legislative authority relied on by appellee could furnish no warrant to damage such property rights as aforesaid, and no shield to it from liability for damage therefor.

The majority opinion refers to certain authorities on the subject of the rights of riparian owners of real estate bordering upon navigable waters. I have no difference with those authorities. The rights of such riparian owners exist at common law and under statute. Such rights are well settled by the authorities, and it is firmly established that such rights, unless derived from legislative authority, never extend beyond the low water wark into navigable tidal salt waters, or upon the beds thereof. The right to build wharves extending beyond the low water mark of navigable tidal salt waters must be derived from legislative grant. Taylor v.
82 Com. 102 Va. 759; Newport News S. Co. v. Jones, 105 Va. 503, 509. Hence, the alleged right of municipality, relied on by appellee in the instant case, to discharge its sewerage into the waters aforesaid and upon the beds thereof are not the right of a riparian owner, and the authorities referred to in the majority opinion on this subject have no bearing in principle or controlling application to the instant case, as I must say, with all due deference.

My view is that the right of the appellee on which it relies in this case can be nowhere found unless under its legislative authority; and, as above stated, it cannot be found under that authority.

The remaining authorities cited in the majority opinion, not referred to above, of note to case of Winchell v. Waukesha, 84 Am. St. Rep. 921-3, and 9 R. C. L. 682, confirm the correctness of the conclusion of this dissenting opinion. There is nothing in the act of assembly of 1908, p. 624, referred to in the majority opinion, to the contrary. Indeed, the latter act expressly provided that the municipality shall "acquire" the land necessary to operate its sewers "by purchase, condemnation, or otherwise," and does not contemplate the damaging of any private property rights without due compensation.

83 Hence, upon principle and upon authority, I think the appellee, upon the case made by the allegations of the bill, is liable in damages to the appellant to the extent of the just compensation required to be paid by section 58 of the Constitution of Virginia, 1902.

The learned judge of the court below would have so held, as appears from the decree appealed from, but for the suppose- binding authority to the contrary of the case of Hampton v. Watson, supra. For the reasons stated above, I do not consider the latter case authority to the contrary. And if it were, I am convinced that upon principle and authority, as aforesaid, it should be overruled.

It is not intended by anything which is said above to intimate that I think an injunction should be granted in the instant case. The granting or refusal of an injunction would depend upon other considerations.

Where a municipal corporation has at great expense constructed and put in operation, and used for a long time, a system of sewerage, an injunction should be refused on the ground that it would be inequitable to give such relief, where relief can be otherwise

84 afforded, as by making just compensation in damages. Grey v. Paterson, 83 Am. St. Rep. 642. Many other authorities might be cited to the same effect.

For the reasons stated above, I am constrained to dissent from the majority opinion.

85 VIRGINIA:

In the Clerk's Office of the Supreme Court of Appeals in the City of Richmond, on the 27th day of June, 1918. The following copy of an order of this court, entered at its place of session at Wytheville was this day received by the clerk here:

"VIRGINIA:

"In the Supreme Court of Appeals, Held at the Court-house of Wythe County, in Town of Wytheville, on Thursday, the 13th Day of June, 1918.

FRANK W. DARLING, Appellant,

against

CITY OF NEWPORT NEWS, Appellee.

Upon an Appeal from and Supersedeas to a Decree Pronounced by the Circuit Court of the City of Newport News on the 27th Day of September, 1916.

"This cause, which is pending in this court at its place of session at Richmond, having been fully heard but not determined at said place of session; this day came here the parties by counsel, and the court having maturely considered the transcript of record of the decree aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the decree complained of. It is, therefore, considered that the same be affirmed, and that the appellant pay to the appellee thirty ($30.00) dollars damages and also its costs by it expended about its defense herein.

Which is ordered to be entered in the order book here and forthwith certified, together with a certified copy of the opinion in this case, to the clerk of this court at Richmond, who will enter this order in the order book there and certify it to the said Circuit Court of the City of Newport News. Appellee's costs at Wytheville, $1.77.

A copy.
Teste:
J. M. KELLY, *C. C.*

Teste:
H. STEWART JONES, *C. C.*

Appellee's costs at Richmond:

Attorney's fee	20.00
Clerk's fees	2.59
	$22.59

86 Supreme Court of Appeals of the State of Virginia.

I, H. Stewart Jones, Clerk of said court, do hereby certify that the writings annexed to this certificate are true copies of the originals on file and of record in said office, and that said originals, together,

constitute the record of the proceedings of said court in the case of Frank W. Darling against City of Newport News.

Witness my hand and the seal of the said court, this the 25th day of July, 1918.

H. STEWART JONES, *Clerk*.

I Stafford G. Whittle, President and one of the Judges of the Supreme Court of Appeals of the State of Virginia, do hereby certify that the foregoing is the true and genuine signature of H. Stewart Jones, Clerk of the said court, and that the foregoing attestation made by him is in due form.

Witness my hand and seal this 25th day of July, 1918.

STAFFORD G. WHITTLE. [SEAL.]

I, H. Stewart Jones, Clerk of said Court, do hereby certify that the Honorable Stafford G. Whittle, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, President of the Supreme Court of Appeals of the State of Virginia, duly commissioned and qualified.

Witness my hand and the seal of said court, this the 25th day of July, 1918.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES, *Clerk*.

Endorsed on cover: File No. 26,686. Virginia Supreme Court of Appeals. Term No. 600. Frank W. Darling, plaintiff in error, vs. City of Newport News. Filed August 9th, 1918. File No. 26,686.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 600.

FRANK W. DARLING, PLAINTIFF IN ERROR,

vs.

CITY OF NEWPORT NEWS.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

MOTION TO ADVANCE.

To the Honorable the Supreme Court of the United States:

Your petitioner, Frank W. Darling, plaintiff in error in the above-styled suit, respectfully moves the court to advance said case for hearing on the docket, and assigns the following special and peculiar circumstances to justify such action:

1. The principal question to be decided in this cause involves the right of the City of Newport News, Virginia, to dump its sewage on the oysters and oyster-planting ground of the plaintiff in error, located in Hampton Roads to the

south and southeast of the City of Newport News. The said oyster-planting ground includes an area of 1,800 acres, and at the time of the institution of this suit the plaintiff had planted on the same four hundred thousand (400,000) bushels of oysters.

The contention of the plaintiff in error is that the said sewage from the City of Newport News is rapidly polluting the oysters on said planting ground and rendering the said planting ground unfit for use. In order, therefore, to preserve the same from pollution, if the plaintiff has any rights in the premises, it is highly important that there should be an early hearing of this cause.

2. Should this controversy be decided in favor of the plaintiff in error, it will be very difficult to estimate the damages which may be eventually awarded him, owing to the difficulty not only in ascertaining the increase in the oysters, but also the damage to the same and to his business, by reason of the reports set out by State and Federal authorities as to pollution of a part of these oyster beds.

For these reasons, your petitioner respectfully prays that his motion to advance may be granted.

Respectfully submitted,

FRANK W. DARLING,

By JONES & WOODWARD AND
J. WINSTON READ,

Attorneys.

SUPREME COURT OF THE UNITED STATES

FRANK W. DARLING, PLAINTIFF IN ERROR,

vs.

CITY OF NEWPORT NEWS.

To the City of Newport News, a Municipal Corporation:

You are hereby notified that on Monday, February 3, 1919, or as soon thereafter as I can be heard, the undersigned will present to the Honorable the Supreme Court of the United States a motion to advance for hearing the above-styled case, for the reasons set out in writing hereto attached.

Respectfully,

FRANK W. DARLING,
By JONES & WOODWARD, AND
J. WINSTON READ,
Attorneys.

Legal service of the above notice is accepted this 23d day of January, 1919.

CITY OF NEWPORT NEWS,
a Municipal Corporation,
By J. A. MASSIE,
City Attorney.

SUBJECT INDEX TO BRIEF

TABLE OF CASES AND AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

FRANK W. DARLING,

Petitioner,

v.

CITY OF NEWPORT NEWS,

A municipal Corporation,

Respondent.

Petition for Writ of Certiorari and Brief

To the Honorable, The Supreme Court of the United States:

The petition of Frank W. Darling respectfully shows to the Court as follows:

Your petitioner heretofore instituted a suit in equity in the Circuit Court for the City of Newport News, State of Virginia, praying for an injunction against said City, restraining it from polluting the oyster beds, and oysters planted thereon, of petitioner, located on the North side of the body of water known as Hampton Roads, Elizabeth City County, Virginia, which pollution was caused by a discharge of sewage of said City over, above and upon the said oyster planting ground and oysters. The bill likewise prayed for damages against said City on account

of the planting ground and oysters already destroyed by the discharge of said sewage by the City of Newport News.

The petitioner, and those under whom he claims, acquired their rights in said oyster planting ground by virtue of certain leases made by the State of Virginia in the years 1884 and 1885. The original leases were for a period of twenty years and, at their expiration, renewed for another twenty years. Section 2137 of the Code of Virginia provides that so long as the lessee continues to pay the rent, he shall have the "exclusive right to occupy said land for a period of twenty years, subject to such rights, if any, as any other person or persons may previously have acquired." The statute further provides: "When the above amounts are paid, then so long as the rent is paid annually in advance, the State will guarantee the absolute right to the renter to continue to use and occupy the same for the period of twenty years the renter acquired. The interest in said planting ground shall be construed to be a chattel real and shall, at the death of the renter, pass into the hands of the personal representatives for the benefit of creditors and the heirs of the decedent." The law further provides: "Should any lessee of oyster planting grounds * * * have his grounds, or any part thereof, resurveyed or reassigned, such resurvey or reassignment of the grounds shall be deemed to be a continuance of the original assignment, subject to all limitations and conditions under which such grounds were originally assigned."

By an Act of the Legislature of Virginia approved January 16, 1896, a charter was granted to the City of Newport News, and one provision of the said charter authorized the construction of a sewer system. By author-

ity of this provision in the charter, the City of Newport News constructed its sewer system, and a short time before the institution of this suit, made certain additions and extensions thereto which caused the injuries complained of. A demurrer was interposed to said bill by the City of Newport News, which demurrer was sustained by the Circuit Court of the said City, and its decree subsequently affirmed by the Supreme Court of Appeals by a final judgment entered on the 13th day of June, 1918. The sundry grounds of demurrer are set out in the record, to which reference is here made, but the ground on which the Supreme Court of Appeals of Virginia based its conclusion was that petitioner took the lease of his oyster planting grounds subject to the right of the Legislature of Virginia, afterwards to grant to the City of Newport News the right to discharge its sewage thereon, which caused the injuries complained of.

Your petitioner avers that in his said bill of complaint, and also in his petition for appeal and assignments of error therein made and argued before the Supreme Court of Appeals of Virginia, he expressly charged that the said Act of the Legislature of Virginia, approved January 16, 1896, in so far as it authorized the construction of the sewer system aforesaid and the discharge of sewage over and on his oyster planting ground and oysters, was in violation of the Constitution of the United States, and especially the provisions of Article 1, Section 10, and the Fourteenth Amendment to the said Constitution. The protection of the Constitution of the United States, and especially the provisions aforesaid, were expressly invoked by your petitioner. Notwithstanding these facts, the Supreme Court of Appeals of Virginia decided against the claim and contention thus specially set up and claimed by petitioner. And petitioner shows

that the said judgment and decision and interpretation of said Act of the Legislature of Virginia, as administered and justified by the said Court, were and are repugnant to the said United States Constitution, and especially the provisions aforesaid. Your petitioner is advised that in rendering said judgment and decision, the said Supreme Court of Appeals of Virginia was in error.

Your petitioner presents herewith as a part of this petition, a transcript of the record in the Supreme Court of Appeals of Virginia, the highest Court of the State.

Your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of Appeals of Virginia, commanding said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Supreme Court of Appeals of Virginia in this case, to the end that said cause may be reviewed and determined by this Court, as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as this Court may deem appropriate, and that the said judgment of the said Supreme Court of Appeals of Virginia may be reversed by this Honorable Court. And he will ever pray, etc.

FRANK W. DARLING,
By Jones & Woodward,
John Winston Read,
Attorneys.

State of Virginia,
City of Newport News, to-wit:

J. Winston Read, being duly sworn, says that he is of counsel for Frank W. Darling, the petitioner; that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes:

J. WINSTON READ, Affiant.

Sworn to and subscribed before me, this 8th day of August, 1918.

W. T. MOSS,
Notary Public.

My commission expires October 30th, 1921.

IN THE

SUPREME COURT OF THE UNITED STATES

FRANK W. DARLING,
Plaintiff in Error,

vs.

CITY OF NEWPORT NEWS,
Defendant in Error.

Brief for Plaintiff in Error

PROCEDURE

In this case a writ of error was first applied for and granted to the Supreme Court of Appeals of Virginia. Owing to the importance of the case to the plaintiff in error, and to obviate any possible question as to the proper procedure, his counsel thought best to employ both the writ of error and certiorari in order that there might be an adjudication upon the merits. This practice seems to have received the sanction of this Court.

Zoline's Fed. App. Jur. & Proc., p. 129.
Pullman's Palace Car Co. v. Central Transportation Co., 171 U. S. 138, 43 L. Ed., 108.

Johnson v. Southern P. Co., 196 U. S. 1, 49 L. Ed., 363.

Accordingly, counsel for plaintiff in error respectfully requests the Court to consider this brief as filed in both proceedings. They would greatly prefer, however, that the case be heard upon the writ of error, if such be the proper method of review.

STATEMENT OF CASE

The plaintiff in error, Frank W. Darling, is the lessee from the State of Virginia of eighteen hundred (1800) acres of oyster planting ground located in the body of water known as Hampton Roads, lying principally in the County of Elizabeth City, Virginia, and to the south and southeast of the City of Newport News. This ground extends from a point near the mouth of the James River to a point opposite Old Point Comfort. It is located on the north side of Hampton Roads and constitutes the largest connected area of oyster planting ground in Virginia, producing a considerable percentage of the oysters sold by planters in the eastern portion of the United States. At the time of the institution of this suit, Mr. Darling had planted on this ground 400,000 bushels of oysters and his investment approximated the sum of Three Hundred Thousand Dollars ($300,000). His customers are located in practically every State east of the Mississippi River.

The assignments of this oyster ground were originally made in 1884 and 1885, and the plaintiff in error has paid the annual rent thereon and otherwise complied with all oyster laws of the State of Virginia. The original leases were for a period of twenty years, and at their expiration, renewed for another period of twenty yers.

Section 2137 of the Code of Virginia provides that so long as the lessee continues to pay the rent, he shall have the "exclusive right to occupy said land for a period of twenty years, subject to such rights, if any, as any other person or persons may previously have acquired." The statute further provides: "When the above amounts are paid, then so long as the rent is paid annually in advance, the State will guarantee the absolute right to the renter to continue to use and occupy the same for the period of twenty years the renter acquired. The interest in said planting ground shall be construed to be a chattel real and shall, at the death of the renter, pass into the hands of the personal representatives for the benefit of creditors and the heirs of the decedent." The law further provides: "Should any lessee of oyster planting grounds * * * have his grounds, or any part thereof, resurveyed or reassigned, such resurvey or reassignment of the grounds shall be deemed to be a continuance of the original assignment, subject to all limitations and conditions under which such grounds were originally assigned."

By an Act of the Legislature of Virginia approved January 16, 1896, a charter was granted to the City of Newport News, and one provision of the said charter authorized the City to "build or acquire sewers within the said City." By authority of this provision in the charter, the City of Newport News constructed its sewer system, and a short time before the institution of this suit, made certain additions and extensions thereto which caused the injuries complained of. The plaintiff in error promptly brought a suit in the Circuit Court for the City of Newport News, praying for an injunction against the said City restraining it from polluting the said oyster

beds and oysters planted thereon. The bill likewise prayed for damages against the said City on account of the planting ground and oysters already destroyed by the discharge of said sewage by the said City. A demurrer was interposed to said bill by the City of Newport News, wherein is set up the absolute right to discharge the said sewage over, above and upon the oyster planting ground and oysters of the plaintiff in error, on the ground that the waters of Hampton Roads are tidal waters, and that a municipal corporation has the right to use such waters for the purpose of carrying off its sewage to the sea, and any injury occasioned thereby to private oyster beads is *damnum absque injuria*. The said demurrer was sustained by the Circuit Court of the City of Newport News, and its decree affirmed by the Supreme Court of Appeals by a final judgment entered on the 13th day of June, 1918.

QUESTIONS INVOLVED.

The questions involved are:

1. Whether the taking and destruction of plaintiff in error's oysters and oyster planting ground, and the Act of the Legislature of Virginia authorizing the same, is not in violation of Article 1, Section 10 of the Constitution of the United States, in that the lease or assignment to plaintiff in error of the oyster planting ground in controversy, pursuant to authority vested in State officials by statute, constitutes a contract which cannot be impaired or destroyed by subsequent legislation.

2. Whether the taking and destruction of plaintiff in error's oysters and oyster planting ground, and the Act of the Legislature of Virginia authorizing the same, is not in conflict with the Fourteenth Amendment to the Constitution of the United States forbidding the taking

of private property for public use without making just compensation.

MANNER IN WHICH QUESTIONS WERE RAISED

The plaintiff in error, in his bill of complaint and also in his petition for appeal and assignments of error therein made and argued before the Supreme Court of Appeals of Virginia, expressly charged that the City of Newport News had no right to take and deprive him of his oyster planting ground and oysters without making just compensation, and that the Act of the Legislature of Virginia approved January 16, 1896, in so far as it authorized the construction of the sewer system aforesaid and the discharge of sewage over and on his oyster planting ground and oysters, was in violation of the Constitution of the United States, and especially the provisions of Article 1, Section 10, and the Fourteenth Amendment to the said Constitution. The protection of the Constitution of the United States, and especially the provisions aforesaid, were expressly invoked by the plaintiff in error. Notwithstanding these facts, the Supreme Court of Appeals of Virginia decided against the claim and contention thus specifically set up and claimed by plaintiff in error.

ASSIGNMENTS OF ERROR.

The plaintiff in error submits that in the record and proceedings and the judgment rendered in the Supreme Court of Appeals of Virginia, there is manifest error in this, to-wit:

First: The Court erred in holding that the taking and destruction of plaintiff in error's oysters and oyster planting ground and depriving him of the use thereof,

and in construing the Act of the Legislature of Virginia, approved January 16, 1896, granting a charter to the City of Newport News and authorizing the construction of the sewer system which caused the injuries complained of, to so take and damage the plaintiff in eror's said property and deprive him of the use thereof, was not in violation of Article 1, Section 10, of the Constitution of the United States.

Second: The Court erred in holding that the taking and destruction of plaintiff in error's oysters and oyster planting ground and depriving him of the use thereof, and in construing the Act of the Legislature of Virginia, approved January 16, 1896, granting a charter to the City of Newport News and authorizing the construction of the sewer system, which caused the injuries complained of, to so take and damage the plaintiff in error's said property and deprive him of the use thereof, was not in violation of the Fourteenth Amendment to the Constitution of the United States.

Third: The Court erred in holding that the Act of the Legislature of Virginia, approved January 16, 1896, granting a charter to the City of Newport News and authorizing the construction of the sewer system, which caused the injuries complained of, as administered and justified by the said Court, was not in violation of Article 1, Section 10, of the Constitution of the United States, as impairing the obligation of the contract existing between the plaintiff in error and the State of Virginia by virtue of the leases of the said oyster planting grounds from the State of Virginia by plaintiff in error in the years 1884 and 1885.

Fourth: The Court erred in holding that the Act of the Legislature of Virginia, approved January 16, 1896,

granting a charter to the City of Newport News and authorizing the construction of the sewer system, which caused the injuries complained of, as administered and justified by the said Court, was not in violation of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT

In the years 1884 and 1885, the agents of the State of Virginia, pursuant to legislation authorizing the same, leased to the plaintiff in error the oyster planting ground in controversy. By virtue of said leases the State guaranteed "the absolute right to the renter to continue to use and occupy such ground for the period of twenty years from the date of the assignment, subject only to the right of fishing in waters above the said bottom." The law further provides that the "interest in such grounds shall be construed to be a chattel real, and at the death of the renter, pass into the hands of the personal representatives for the benefit of creditors and heirs of the decedent." Again: "Should any lessee of oyster planting grounds have his grounds, or any part thereof, reassigned, such reassignment, in part or in whole, shall not be construed to be a new assignment of such grounds, but shall be deemed to be a continuation of the original assignment, subject to all the limitations and conditions under which such grounds were originally assigned."

> Compilation of Oyster Laws, Code of Va., 1910, p. 980, Sec. 9.

By Section 2137 of the Code of Virginia, it is further provided that the right of the licensee or lessee shall be exclusive, "subject to such rights, if any, as any other person or persons may *previously* have acquired."

In addition to the right of fishing, it is conceded that the plaintiff in error took his leases subject to the right of navigation, which is controlled by Federal law. But that question is not in issue here.

Long after Darling acquired his rights, the City of Newport News was chartered by an Act of the Legislature of Virginiaa, approved January 16, 1896, and by Section 29 of said Act the said City of Newport News was authorized to "build or acquire sewers within the said City." Pursuant to this authority, it constructed the system of sewers, the sewage from which polluted the oyster beds of plaintiff in error.

The question to be decided is whether, under the Constitution of the United States, the City of Newport News can thus take and deprive the plaintiff in error of his property, without making to him just compensation.

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Mr. Chief Justice Waite, in construing the Virginia Oyster Law, said in part: "The planting of oysters in the soil covered by water owned in common by the People of the State is not different in principle from that of planting corn upon dry land held in the same way. Both are for the purposes of cultivation and profit; and if the State in the regulation of its public domain, can grant to its own citizens the exclusive use of dry lands, we see no reason why it may not do the same thing in respect to such as are covered by water."

Conceding then, as it must be conceded, that the statutes aforesaid give to Darling the absolute and exclusive use and occupancy of this ground for a period of twenty years, with the right to renew the same for another period of twenty years, upon the same terms and conditions as set out in the original lease between the State of Virginia and the said Darling, how then can the State of Virginia afterwards grant to the City of Newport News the authority to take and destroy the property of the plaintiff in error without providing to him any compensation whatsoever? It would seem to be plain that such action on the part of the State not only impairs the obligation of the contract previously existing between it and the plaintiff in error (Cooley's Com. Lim., 6 Ed., p. 328; Fletcher v. Peck, 6 Cranch 87, 136; State of New Jersey v. Wilson, 7 Cranch 64), but likewise takes his property for public use without making just compensation, which the requirement of "due process of law" in the Fourteenth Amendment to the Constitution forbids.

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And where Federal Courts are called upon to interpret the contracts of States, this rule applies whether such contracts originate in State legislation or in agreements made by agents of a State by its authority. Ibid.

It will be noted that the opinion of the Supreme Court of Appeals of Virginia was not unanimous. Judge Sims filed an able and exhaustive dissenting opinion which will be found in the record. It would serve no useful purpose to reiterate the views expressed by Judge Sims, or cite the cases quoted in his opinion, but it is insisted that his conclusions are supported by reason and authority. We desire to emphasize, however, the case of Huffmire v. City of Brooklyn, 162 N. Y. 584, 48 L. R. A. 421, wherein the facts were practically identical with the facts in the case at bar. Huffmire's oysters and oyster planting grounds were located in tide-water bordering upon the City of Brooklyn. The Legislature of New York authorized the town of Flatbush (afterwards a part of the City of Brooklyn) to build a sewer, the sewage from which emptied into Jamaica Bay and polluted the oysters of Huffmire. The Court said in part:

> "The plaintiffs contend that the casting of noxious and destructive substances upon their oyster

bed was not a consequential, but a direct injury. The defendant insists that the discharge of the sewer in question into the waters of Mill Creek is simply the consequential result of obedience to the legislative mandate, and that, in the absence of negligence on the part of the municipal authorities in the construction and operation of said sewer, the defendant is not liable. Applying the rule which the defendant invokes in all its force and breadth, we think this case falls directly within the constitutional inhibition against the taking of property without compensation. The plaintiffs were lawfully in possession of a piece of land under water upon which they had planted a bed of oysters. They had their title under legislative authority, which was as ample and unquestioned as that under which defendant's sewer was constructed. Although this land was under public waters, it was as much the private property of the plaintiffs as though it had been a tract of farm land held under a lease from the town of Flatlands under legislative authority. The act of the defendant in pouring its sewage upon this land was not consequential. It was as direct as though it had been discharged upon a piece of land owned or rented by the plaintiffs, and used for farming or gardening purposes. In the latter case a municipal corporation could not successfully defend its trespass because it was acting under legislative authority, or because its sewage had been carried to the lands of the person complaining over the lands of others. The fact that plaintiff's land was under public water, and that defendant's sewage was discharged upon it, after passing through 300 feet of public water the land under which was not in the possession or control of the plaintiffs, does not differentiate this case in principle from the illustrative case of a discharge of sewage upon surface lands. In either case the injury is so direct as to amount to an invasion of a private right, which no

legislative sanction or direction can justify or excuse. These views are, we think, sustained by abundant authority."

And again:

"We are of the opinion that any direct invasion of a man's land is a taking of his property within the meaning of the Constitution. The destruction of plaintiff's oysters by the casting of sewage upon them was as clearly a taking of their property as the physical removal and conversion of the same would have been."

The majority opinion cites the Huffmire case and states that it appears to sustain the contention of plaintiff in error. After a most careful comparison of the statutes of New York and Virginia, counsel for plaintiff in error can find no material difference between the statutes, and to all intents and purposes they are practically identical.

That injunction is the proper remedy in this case, would seem to be plain from the allegations of the bill which, of course, are taken as true upon demurrer. The bill alleges that the sewage of the City had already polluted about 100 acres of oyster ground, and that the residue would shortly be polluted unless relief was had by injunction.

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For these reasons, we submit that the judgment of the Supreme Court of Appeals of Virginia sustaining the demurrer to the bill of complaint and dismissing the suit, should be reversed.

Respectfully submitted,

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SUBJECT INDEX TO BRIEF

TABLE OF CASES AND AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

FRANK W. DARLING,
Plaintiff in Error,

vs.

CITY OF NEWPORT NEWS,
Defendant in Error.

Brief for Plaintiff in Error

PROCEDURE

In this case a writ of error was first applied for and granted to the Supreme Court of Appeals of Virginia. Owing to the importance of the case to the plaintiff in error, and to obviate any possible question as to the proper procedure, his counsel thought best to employ both the writ of error and certiorari in order that there might be an adjudication upon the merits. This practice seems to have received the sanction of this Court.

Zoline's Fed. App. Jur. & Proc., p. 129.
Pullman's Palace Car Co. v. Central Transportation Co., 171 U. S. 138, 43 L. Ed., 108.

Johnson v. Southern P. Co., 196 U. S. 1, 49 L. Ed., 363.

Accordingly, counsel for plaintiff in error respectfully requests the Court to consider this brief as filed in both proceedings. They would greatly prefer, however, that the case be heard upon the writ of error, if such be the proper method of review.

STATEMENT OF CASE

The plaintiff in error, Frank W. Darling, is the lessee from the State of Virginia of eighteen hundred (1800) acres of oyster planting ground located in the body of water known as Hampton Roads, lying principally in the County of Elizabeth City, Virginia, and to the south and southeast of the City of Newport News. This ground extends from a point near the mouth of the James River to a point opposite Old Point Comfort. It is located on the north side of Hampton Roads and constitutes the largest connected area of oyster planting ground in Virginia, producing a considerable percentage of the oysters sold by planters in the eastern portion of the United States. At the time of the institution of this suit, Mr. Darling had planted on this ground 400,000 bushels of oysters and his investment approximated the sum of Three Hundred Thousand Dollars ($300,000). His customers are located in practically every State east of the Mississippi River.

The assignments of this oyster ground were originally made in 1884 and 1885, and the plaintiff in error has paid the annual rent thereon and otherwise complied with all oyster laws of the State of Virginia. The original leases were for a period of twenty years, and at their expiration, renewed for another period of twenty yers.

Section 2137 of the Code of Virginia provides that so long as the lessee continues to pay the rent, he shall have the "exclusive right to occupy said land for a period of twenty years, subject to such rights, if any, as any other person or persons may previously have acquired." The statute further provides: "When the above amounts are paid, then so long as the rent is paid annually in advance, the State will guarantee the absolute right to the renter to continue to use and occupy the same for the period of twenty years the renter acquired. The interest in said planting ground shall be construed to be a chattel real and shall, at the death of the renter, pass into the hands of the personal representatives for the benefit of creditors and the heirs of the decedent." The law further provides: "Should any lessee of oyster planting grounds * * * have his grounds, or any part thereof, resurveyed or reassigned, such resurvey or reassignment of the grounds shall be deemed to be a continuance of the original assignment, subject to all limitations and conditions under which such grounds were originally assigned."

By an Act of the Legislature of Virginia approved January 16, 1896, a charter was granted to the City of Newport News, and one provision of the said charter authorized the City to "build or acquire sewers within the said City." By authority of this provision in the charter, the City of Newport News constructed its sewer system, and a short time before the institution of this suit, made certain additions and extensions thereto which caused the injuries complained of. The plaintiff in error promptly brought a suit in the Circuit Court for the City of Newport News, praying for an injunction against the said City restraining it from polluting the said oyster

beds and oysters planted thereon. The bill likewise prayed for damages against the said City on account of the planting ground and oysters already destroyed by the discharge of said sewage by the said City. A demurrer was interposed to said bill by the City of Newport News, wherein is set up the absolute right to discharge the said sewage over, above and upon the oyster planting ground and oysters of the plaintiff in error, on the ground that the waters of Hampton Roads are tidal waters, and that a municipal corporation has the right to use such waters for the purpose of carrying off its sewage to the sea, and any injury occasioned thereby to private oyster beads is *damnum absque injuria.* The said demurrer was sustained by the Circuit Court of the City of Newport News, and its decree affirmed by the Supreme Court of Appeals by a final judgment entered on the 13th day of June, 1918.

QUESTIONS INVOLVED.

The questions involved are:

1. Whether the taking and destruction of plaintiff in error's oysters and oyster planting ground, and the Act of the Legislature of Virginia authorizing the same, is not in violation of Article 1, Section 10 of the Constitution of the United States, in that the lease or assignment to plaintiff in error of the oyster planting ground in controversy, pursuant to authority vested in State officials by statute, constitutes a contract which cannot be impaired or destroyed by subsequent legislation.

2. Whether the taking and destruction of plaintiff in error's oysters and oyster planting ground, and the Act of the Legislature of Virginia authorizing the same, is not in conflict with the Fourteenth Amendment to the Constitution of the United States forbidding the taking

of private property for public use without making just compensation.

MANNER IN WHICH QUESTIONS WERE RAISED

The plaintiff in error, in his bill of complaint and also in his petition for appeal and assignments of error therein made and argued before the Supreme Court of Appeals of Virginia, expressly charged that the City of Newport News had no right to take and deprive him of his oyster planting ground and oysters without making just compensation, and that the Act of the Legislature of Virginia approved January 16, 1896, in so far as it authorized the construction of the sewer system aforesaid and the discharge of sewage over and on his oyster planting ground and oysters, was in violation of the Constitution of the United States, and especially the provisions of Article 1, Section 10, and the Fourteenth Amendment to the said Constitution. The protection of the Constitution of the United States, and especially the provisions aforesaid, were expressly invoked by the plaintiff in error. Notwithstanding these facts, the Supreme Court of Appeals of Virginia decided against the claim and contention thus specifically set up and claimed by plaintiff in error.

ASSIGNMENTS OF ERROR.

The plaintiff in error submits that in the record and proceedings and the judgment rendered in the Supreme Court of Appeals of Virginia, there is manifest error in this, to-wit:

First: The Court erred in holding that the taking and destruction of plaintiff in error's oysters and oyster planting ground and depriving him of the use thereof,

and in construing the Act of the Legislature of Virginia, approved January 16, 1896, granting a charter to the City of Newport News and authorizing the construction of the sewer system which caused the injuries complained of, to so take and damage the plaintiff in eror's said property and deprive him of the use thereof, was not in violation of Article 1, Section 10, of the Constitution of the United States.

Second: The Court erred in holding that the taking and destruction of plaintiff in error's oysters and oyster planting ground and depriving him of the use thereof, and in construing the Act of the Legislature of Virginia, approved January 16, 1896, granting a charter to the City of Newport News and authorizing the construction of the sewer system, which caused the injuries complained of, to so take and damage the plaintiff in error's said property and deprive him of the use thereof, was not in violation of the Fourteenth Amendment to the Constitution of the United States.

Third: The Court erred in holding that the Act of the Legislature of Virginia, approved January 16, 1896, granting a charter to the City of Newport News and authorizing the construction of the sewer system, which caused the injuries complained of, as administered and justified by the said Court, was not in violation of Article 1, Section 10, of the Constitution of the United States, as impairing the obligation of the contract existing between the plaintiff in error and the State of Virginia by virtue of the leases of the said oyster planting grounds from the State of Virginia by plaintiff in error in the years 1884 and 1885.

Fourth: The Court erred in holding that the Act of the Legislature of Virginia, approved January 16, 1896,

granting a charter to the City of Newport News and authorizing the construction of the sewer system, which caused the injuries complained of, as administered and justified by the said Court, was not in violation of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT

In the years 1884 and 1885, the agents of the State of Virginia, pursuant to legislation authorizing the same, leased to the plaintiff in error the oyster planting ground in controversy. By virtue of said leases the State guaranteed "the absolute right to the renter to continue to use and occupy such ground for the period of twenty years from the date of the assignment, subject only to the right of fishing in waters above the said bottom." The law further provides that the "interest in such grounds shall be construed to be a chattel real, and at the death of the renter, pass into the hands of the personal representatives for the benefit of creditors and heirs of the decedent." Again: "Should any lessee of oyster planting grounds have his grounds, or any part thereof, reassigned, such reassignment, in part or in whole, shall not be construed to be a new assignment of such grounds, but shall be deemed to be a continuation of the original assignment, subject to all the limitations and conditions under which such grounds were originally assigned."

> Compilation of Oyster Laws, Code of Va., 1910, p. 980, Sec. 9.

By Section 2137 of the Code of Virginia, it is further provided that the right of the licensee or lessee shall be exclusive, "subject to such rights, if any, as any other person or persons may *previously* have acquired."

In addition to the right of fishing, it is conceded that the plaintiff in error took his leases subject to the right of navigation, which is controlled by Federal law. But that question is not in issue here.

Long after Darling acquired his rights, the City of Newport News was chartered by an Act of the Legislature of Virginiaa, approved January 16, 1896, and by Section 29 of said Act the said City of Newport News was authorized to "build or acquire sewers within the said City." Pursuant to this authority, it constructed the system of sewers, the sewage from which polluted the oyster beds of plaintiff in error.

The question to be decided is whether, under the Constitution of the United States, the City of Newport News can thus take and deprive the plaintiff in error of his property, without making to him just compensation.

Apparently, the language of the above statutes giving to the lessee the absolute and exclusive use and occupancy of the planting ground, needs no interpretation. Both the Supreme Court of Appeals of Virginia and the United States Supreme Court have construed this statute to give to the lessee a property right, and the mere fact that it is a lease and not a fee-simple title, cannot affect the question. The Virginia Court, in the case of Powell v. Tazewell, 66 Va. (25 Grat.) 786, declared: "The design and object of this suit is to give *exclusive* right to the licensee or lessee to use and occupy the land * * * It confers, in fact, an exclusive right to use, occupy or take the profits of land, by planting or sowing oysters upon it."

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> "The plaintiffs contend that the casting of noxious and destructive substances upon their oyster

The contention that a State law as administered and justified by the highest Court of the State violates the Federal Constitution, presents a Federal question which sustains a writ of error, although the State law, as written, is not attacked.

Myles Salt Company, v. Board of Commissioners
239 U. S. 478, 60 L. Ed. 392

Detroit United Railway, v. Michigan
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APPEALS PRESS, RICHMOND, VA.

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STATEMENT—OYSTER LAW.

On pages 3 to 6, inclusive of the brief of the plaintiff in error, he raises the question on the demurrer for the first

time in this court as to the right of the plaintiff in error to hold the oyster ground in controversy under a lease from the State of Virginia, which makes it proper and necessary to lay before the court the following Statutes of Virginia:

> Section 2137. Assignment to riparian owners and others of locations for planting oysters; appeal from decision of inspector; locations to be marked with suitable stakes; payment of fees and rent to inspectors.—If any owner or occupant of land having a water-front thereon suitable for planting oysters, shall desire to obtain a location thereon for planting oysters, he may make application to the inspector for the county or district in which the land lies, who shall assign to him on such location as such owner or occupant may designate in front of his land. No assignment shall exceed one-half acre, and a survey and plat whereof to be made by the county surveyor, which shall indicate the metes and bounds, courses and distances, starting from fixed and permanent objects on the shore, as accurately as may be, the same to be recorded as provided for recordation of other plats, the cost of survey and plat, and recordation, to be paid by the riparian owner or occupant. The surveyor's fee shall be one dollar. It shall be the duty of such owner or occupant to cause the location to be marked with suitable stakes, according to the assignment, and thereafter he shall have the exclusive right to the use thereof for the purpose aforesaid, and the privilege is accorded to the said owner in consideration of the extra valuation ordinarily assesed upon such land for the water privileges supposed to attach thereto. The inspector making the assignment of reservation shall be paid by such owner or occupant a fee of fifty cents; said

assignment to the riparian owner or occupant to pass with the land to the subsequent owner or occupant. If any portion of said water-front herein reserved or provided for said riparian owner or occupant of land, shall be occupied by others with oysters actually planted thereon at the time a location is made of said reservation, the person so occupying the same shall have eighteen months to remove the said oysters so planted. The residue of said water-front in excess of what is herein reserved for the riparian owner, and the residue of the beds of the bays, rivers, and creeks, other than natural oyster beds or rocks, may be occupied by any persons for the purpose of planting or propagating oysters thereon; provided, that no assignment hereafter made shall exceed two hundred and fifty acres; but this limit shall not affect assignments heretofore made, in excess of that amount, and provided further that no limit herein provided for shall affect assignments made in the Chesapeake bay. It shall be the duty of any such person desiring to obtain a location for planting or propagating oysters in any portion of the water-fronts and beds aforesaid, not located or reserved as hereinbefore provided for owners and occupants of land aforesaid, to apply to the inspector of the district in which the land lies, to have his location ascertained and designated, and surveyed, and the same shall be marked with suitable stakes, smooth and free from snags and spurs, or by other metes and bounds, course and distances, having their places of beginning and ending designated by permanent objects on the shore, agreed upon between the applicant and inspector, and he shall pay the inspector for his services a fee of one dollar; and he shall also pay to the inspector rent

for the land assigned him at the rate of one dollar per acre for each and every year of his rental; provided, however, that on the ocean side of the counties of Accomac and Northampton, he shall pay a rental of fifty cents per acre, the same to be payable on the first day of September of each year, and so long as he continues to pay such rent, he shall have the exclusive right to occupy said land for a period of twenty years, subject to such rights, if any, as any other person or persons may previously have acquired. If any portion of said water-fronts or beds or bays, rivers and creeks, be occupied with oysters actually planted thereon or held by any person under proper assignment, evidenced by the receipt or certificate of the inspector, at the time, a location is made or sought to be made, under this section, the occupant shall have the prior right against all others to have the land so occupied by him assigned to him by the inspector; provided, the said occupant shall have the land so occupied by him ascertained and designated, and surveyed within thirty days from the time the inspector is called on to locate the same. This section, so far as the quantity of land to be assigned to and held by riparian owners is concerned, shall not apply to the counties of Richmond, Northampton, Northumberland and Westmoreland; but section six of chapter two hundred and fifty-four, acts of eighteen and eighty-three and eighty-four, shall continue in force as to the said counties; provided, that nothing in the said section which restores to riparian owners in said counties one-fourth of their respective water-fronts suitable for planting oysters, shall be so construed as to permit the owners of water-fronts to compel occupants of said fronts to remove their oysters from any

fourth of said shore, if the residue of said shore be already in his (the land owner's) possession or be unoccupied; and provided further, that all applications for assignments of oyster planting grounds, other than for the ground reserved for riparian owners, shall be made to the oyster inspector of the county or district in which said grounds are located, stating as near as may be the numbers of acres applied for, the name of the waters in which located, and the name of one or more prominent points or places convenient to said ground; thereupon the said inspector shall cause notices of said applications to be posted for at least thirty days, at the courthouse of said county, and at two or more prominent places in the vicinity of said grounds; said notices shall contain the name or names of applicants, the probable number of acres applied for by each, the name of the waters where located, and the name of one or more prominent points convenient to said grounds; after the expiration of the thirty days' notice as aforesaid, the inspector shall proceed to survey and assign the ground so applied for; provided, he ascertains it is not a natural bed, rock or shoal within the meaning of this act. [Acts 1891-'92, page 596. In force on and after February 25, 1892.]

Act of the General Assembly, 1891-92 at page 816. Approved February 29, 1892.

"Be it enacted by the General Assembly of Virginia, That the board on the Chesapeake and its tributaries shall, as soon as possible after the passage of this act, cause to be made a true and accurate survey of the natural oyster beds, rocks and

shoals of the Commonwealth, said survey to be made with reference to fixed and permanent objects on the shore, giving courses and distances, to be described in the written report of said survey hereinafter required; and a true and accurate delineation of the same shall be made on copies of the published maps and charts of the United States coast and geodetic survey, which said copies shall be filed in the archives of this State, in the capitol at Richmond. And the said board shall further cause to be delineated, on a copy of the published maps and charts of the United States coast and geodetic survey, of the largest scale, for each of the counties of the Commonwealth, in the waters of which there are natural oyster beds, rocks and shoals, all the natural rocks, beds or shoals lying within the waters of each of the said counties, which said maps shall be filed in the Clerk's Office of the county court of the county wherein may be the grounds so delineated. For example: The map delineating the grounds lying in the waters of the county of Accomac, to be filed in the Clerk's Office of the county court of Accomac, and so on.

And the said board on the Chesapeake and its tributaries, in order to carry into execution this law, shall direct the fish commissioner, who is hereby appappointed a shellfish commissioner, whose duty it shall be to direct and control the survey herein provided for. Said commissioner shall cause to be marked and defined, as accurately as is practicable, the limits and boundaries of the natural oyster rocks, beds and shoals, as established by said survey, and he shall take true and accurate notes of said survey, in writing, and make up such an accurate report of said survey, setting forth a description of the lines,

which courses and distances, and description of the land marks, as may be necessary to enable the oyster inspector to find and ascertain the boundary lines and limits of said natural oyster rocks, beds and shoals, as shown by the delineation on the maps and charts provided for in section one of this act. Said report shall be completed and transmitted to the board on the Chesapeake and its tributaries within three months after the completion of the said survey. The said board shall cause the same to be published in pamphlet form and transmit copies of the same to the clerk of the county court of the counties where the charts have been filed or directed to be filed as hereinbefore provided for—the said report to be filed by the clerks of the said several counties. And the said survey and report, when so filed, shall be and be construed to be, in all the courts of the Commonwealth, as conclusive evidence of the boundaries and limits of the natural oyster beds, rocks and shoals, lying within the waters of the counties wherein such survey and report are filed: provided, if any natural rock, bed or shoal is left out in these surveys, they shall not be used for planting grounds, but shall be subject to the general oyster laws of the State. All the work appertaining to and necessary to the completion of said survey shall be under the control and done under the direction of the board on the Chesapeake and its tributaries, which said board is hereby empowered to require the shellfish commissioner hereinbefore named to do all things necessary to the successful prosecution and completion of the said survey.

The said board on the Chesapeake and its tributaries shall have the control and management of any fund which may be appropriated to carry into exe-

cution this law, and the said board shall turn over to the shellfish commissioner, to be appointed under this act, at such times and in such amounts as they may deem necessary and proper, any portion of such appropriation, and said shellfish commissioner shall disburse the same in defraying the proper and actual expenses of executing this law, and he shall make a true and detailed report of his disbursements to the said board. But before said commissioner shall perform any of the duties hereby imposed upon him or receive any money under this act, he shall execute bond in the penalty of two thousand dollars, payable to the Commonwealth of Virginia, conditioned for the faithful performance of his duties.

The said county court of the counties in the waters of which there are any natural oyster beds, rocks or shoals, shall, in term time or vacation, appoint three commissioners for each of said counties respectively. These three commissioners shall act with the shellfish commissioners in their respective counties. These three commissioners shall determine the question of what bottoms are natural oyster-beds, rocks or shoals, and the lines defining these limits shall be run by the shellfish commissioner and the engineer as they direct. These commissioners shall receive for their services the sum of two dollars per day while actually so employed.

Said shellfish commissioner shall be paid the sum of one hundred and fifty dollars per month for the time he is actually engaged in the execution of the work as hereinbefore set forth; provided said work shall not consume a longer period than twelve months of actual work from its beginning; and when the survey and report hereinbefore mentioned in this

act have been completed, the duties and the salary of the said shellfish commissioner shall cease and determine.

The board on the Chesapeake and its tributaries shall avail themselves in executing this law of the assistance tendered by the United States coast and geodetic survey.

This act shall be in force from its passage."

Act of the General Assembly of 1893-94, page 605. Approved March 2, 1894:

"Be it enacted by the General Assembly of Virginia, That section two of an act approved February twenty-ninth, eighteen hundred and ninety-two, entitled an act to protect the oyster industry of the Commonwealth, be amended and re-enacted as to read as follows:—

And the said board on the Chesapeake and its tributaries, in order to carry into execution this law, shall direct the fish commissioner, who is hereby appointed a shell fish commissioner, whose duty it shall be to direct and control the survey herein provided for. Said commissioner shall cause to be marked and defined, as accurately as practicable; the limits and boundaries of the natural oyster rocks, beds and shoals as established by said survey; and he shall take true and accurate notes of said survey in writing and make up such an accurate report of said survey, setting forth a description of the lines, with courses and distances and a description of the land marks as may be necessary to enable the oyster inspector to find and ascertain the boundary lines and limits of said natural oyster rocks, beds and shoals, as shown by the delineation

on the maps and charts provided for in section one of this act. Said report shall be completed and transmitted to the board on the Chesapeake and its tributaries within three months after the completion of the said survey. The said board shall cause the same to be published in pamphlet form, and transmit copies of the same to the clerk of the county court of the counties where the charts have been filed, or directed to be filed, as hereinbefore provided for; the said report to be filed by the clerks of the said several counties; and the said survey and report, when so filed, shall be, and be construed to be, in all the courts of the Commonwealth, as conclusive evidence of the boundaries and limits of all the natural oyster beds, rocks and shoals lying within the waters of the counties wherein such survey and report are filed; and shall be construed to mean in all of the said courts that there are no natural oyster beds, rocks or shoals lying within the waters of the counties wherein such report and survey are filed, other than those embraced in the survey authorized by this act: provided that the said survey and report shall not be so construed in any pending trial or proceeding in any court upon any assignment made prior to the twenty-fifth of February, eighteen hundred and ninety-two: provided, also, that not less than twenty-five residents of any county may, within four months from the filing of the said survey and report in such county, file in the Clerk's office of the county court of said county a petition, in writing, under oath, alleging that twenty-five or more adjacent acres of natural oyster beds, rocks or shoals in such county have been omitted from said survey, describing the location of the same by a plat, or as near as may be, with reasonable certainty by

such land marks as will locate and designate the rocks, beds and shoals so omitted as aforesaid, but this proviso shall not apply where the ground claimed by the petitioners has been assigned prior to February twenty-fifth, eighteen hundred and ninety-two. The said clerk shall docket the same in the county court. At the next term of the said court the judge thereof shall appoint three commissioners, who shall be persons other than the commissioners directed to be appointed by section four of an act entitled an act to protect the oyster industry of the Commonwealth, approved February twenty-ninth, eighteen hundred and ninety-two, and by its order direct them to ascertain and report to court whether the facts contained in said petition be true.

The said commissioners shall view and examine the alleged oyster rocks, beds or shoals, and to that end may employ a competent surveyor to survey the same at the same rates paid the county surveyor by law for similar services, administer an oath to and examine such witnesses as may appear before them and make report to court. If the said commissioners shall report that less than twenty-five adjacent acres of natural oyster rocks, beds or shoals have been omitted from the said survey the said petition shall be dismissed at the cost of the petitioners, but if the said commisioners shall ascertain and report to court that twenty-five or more adjacent acres of natural oyster rock, bed or shoal in the said county have been omitted from the said survey they shall designate the same by plat or otherwise with reasonable certainty in their said report, which report shall be spread upon the records of the said court, and by the clerk thereof certified to by the board of the Chesa-

peake and its tributaries: provided, however, that in the tributaries of the rivers James, Elizabeth, York, Rappahannock, Potomac, Mobjack Bay, the area to which exception may be taken by the twenty-five citizens shall be ten acres. Thereupon the said board shall direct a survey, under the direction of the said commissioners, of the area designated in said report to be made by the United States coast and geodetic survey officer detailed for duty under section six of an act entitled an act to protect the oyster industry of the Commonwealth, approved February twenty-ninth, eighteen hundred and ninety-two, or by such person as the said board shall direct.

Said survey shall be filed in the clerk's office of said court as the original survey hereinbefore provided for is required to be filed; and when so filed, shall be conclusive evidence in all of the courts of this Commonwealth that the area embraced therein is a natural oyster bed, rock or shoal. The costs of the proceedings in the county court shall be paid by the Commonwealth if the said commissioners shall report in favor of the petitioners. In those counties of the Commonwealth where no survey and report are filed within three months after the completion of the survey of the natural oyster beds, rocks and shoals of the Commonwealth, it shall be construed to mean, in all the courts of the Commonwealth, that there are no natural oyster beds, rocks and shoals in said county or counties, and that all the area of the Chesapeake bay and its tributaries not embraced in the survey of the natural oyster beds, rocks and shoals authorized by this act shall be construed to be, in all the courts of the Commonwealth, barren area, and disposable by the Commonwealth for the pur-

pose of planting or propagating oysters thereon, under section twenty-one hundred and thirty-seven of the code of Virginia, as amended and enacted by act approved February twenty-fifth, eighteen hundred and ninety-two. All the work appertaining to and necessary to the completion of said survey shall be under the control and done under the direction of the board on the Chesapeake and its tributaries; which board is hereby empowered to require the shellfish commissioner hereinbefore named to do all things necessary to the successful prosecution and completion of the said survey.

All acts and parts of acts inconsistent with this act be, and the same are hereby, repealed.

This act shall be in force from its passage.

ARGUMENT.

The act of 1881-2, *relied on by defendant in error repealed.*

By an act approved February 29th, 1892, it is provided that the Board on the Chesapeake and its tributaries should cause to be made a true and accurate survey of the natural oyster rocks, beds and shoals of the Commonwealth. By an act approved March 2nd, 1894, the said act was amended and re-enacted, providing that the reports and surveys, directed to be made shall be and construed to be in all the courts of the Commonwealth as conclusive evidence of the boundaries of all the natural oyster beds, rocks and shoals lying within the waters of the counties wherein such report and survey are filed, and further provided that all the area of the Chesapeake Bay and its tributaries not embraced in the survey of the natural oyster beds, rocks and shoals, authorized by this act, shall be construed to be, in all the courts of the Commonwealth, barren area, dis-

posable by the Commonwealth for the purpose of planting and propagating oysters thereon, under section 2137 of the Code of Virginia as amended and enacted by the act approved February 25th, 1892, and further providing that all acts and parts of acts, inconsistent with that act be and the same are thereby repealed and also that the act should be in force from its passage. Sec. 2137 gives the exclusive right to the planter for a period of twenty years, and further provides that where one already holds ground under proper assignment he shall have the prior right to a re-assignment as against all others. (The said acts have been above set out in full.)

The 29th section of the act of 1895-6 granting a charter to the city of Newport News, in so far as it affects the case at bar is as follows:—

> "To build or acquire sewers within the said city."

The 46th section of the said act provides:

> "The council shall not take any private property for public purposes without making the owner thereof just compensation for the same; and when the council cannot, by agreement with the owner, obtain the title to or the use of such property for such purposes, it shall be lawful for the said council to institute and prosecute proceedings for the condemnation thereof according to law."

Our contention here is that this question cannot be properly raised upon a demurrer to the bill, as the bill nowhere alleges that the oyster planting ground of the plaintiff in error is located on the Hampton Flats, and it was not raised in the State court, and further that, if it be true and

can be here now raised, it is unavailing. The act relied on by the defendant in error was enacted in 1881-2. The subsequent acts repealed that act.

It will not be denied that the whole of Hampton Roads is a tributary of the Chesapeake bay. The acts above about carrying into effect the geodetic survey and especially the act of 1894 specifically provide that *all* the area of the Chesapeake bay and its tributaries not embraced in the survey of the natural oyster beds, rocks and shoals, authorized by this act, shall be construed to be in all the courts of the Commonwealth barren area and disposable by the Commonwealth for the purpose of planting and propagating oysters thereon under section 2137 of the code.

The act of 1894 further provides that all acts and parts of acts inconsistent with this act be and the same are hereby repealed.

Hampton Roads being a tributary of Chesapeake bay, and not included in the survey of the natural oyster beds, rocks and shoals, the act of 1881-2 is inconsistent with the act of 1894 and was repealed by the latter act. We know that repeals by implication are not favored, but when two acts cannot stand together, the latter repeals the former. *Haynes* v. *Commonwealth*, 31 Gratt. (72 Va. 92); *Hogan* v. *Gwigon*, 29 Gratt. (70 Va., 705); *Justice* v. *Commonwealth* (81 Va. 209); *U. S.* v. *Tynen*, 11 Wall. 88; *The State* v. *Stoll*, 17 Wall 425; *Murdock* v. *Memphis*, 20 Wall. 590 *Baltimore and Potomac R. R. Co.* v. *Grant*, 8 Otto (98 U. S.) 398-403; *King* v. *Cornell*, 106 U. S., 395; *Pana* v. *Bowler*, 107 U. S. 529-545. And moreover, the agents of the State, upon whom the power to lease oyster planting grounds was conferred, adopted the construction of the law herein contended for and leased the planting ground as set out in the Bill of Complaint to the plaintiff in error.

Moreover, Section 46 of the Act aforesaid, incorporating the City of Newport News, provides as follows:

> "The council shall not take any private property for public purposes, without making the owner thereof just compensation for the same; and when the council cannot, by agreement with the owner, obtain the title to or the use of such property for such purposes, it shall be lawful for the said council to institute and prosecute proceedings for the condemnation thereof according to law."

This section clearly shows an intent on the part of the legislature that in the event the city of Newport News, in acquiring the sewer system, took private property, just compensation should be paid the owner for the same, and in the event an agreement could not be made with the owner, compensation was to be provided in condemnation proceedings.

Though the construction of the sewers complained of began in 1907, it was only a short time prior to the institution of this suit in the year 1916 that additional sewers were laid by the city, which caused the pollution complained of and the taking of complainant's planting ground.

It is worthy of note that the city of Newport News makes a charge of Twenty Dollars ($20.00) per lot for each lot 25 x 100 feet, for the privilege of connecting with the sewers of said city, and the fees so collected belong exclusively to the said city and are used for city purposes. (Rec. p. 34.)

JURISDICTION—FEDERAL QUESTION.

The defendant in error contends that this Court is without jurisdiction for the reason that no Federal question is involved. This contention, in varying forms, is based upon two grounds: (1) It is contended that the Supreme Court of Appeals of Virginia based its opinion upon the common law, and that the oyster laws of Virginia did not change

the common law. (2) It is further contended that the Act of January 16, 1916, incorporating the City of Newport News, was not passed upon in the majority opinion of the Virginia Court, and consequently its validity not upheld. 1896

Proceeding, now, to discuss these contentions in their order, it is respectfully insisted that as to the first contention, the mere fact that the State Court rests its decision upon an alleged principle of common law is not decisive of the question here involved, but this Court will exercise its independent judgment and decide the Federal question if the necessary effect of the judgment is to deny a Federal right specially set up or claimed and which, if enforced, would require a judgment different from one resting upon some ground of local or general law.

When this Court has under view the judgment of a State Court by virtue of Sec. 709 Revised Stat. U. S. Comp Stat. 1901, p. 575, and the validity of a State law is challenged, on the ground that it impairs the obligation of a contract, this Court must determine for itself the existence or non-existence of the asserted contract, and whether its obligation has been impaired.

Zoline's Fed. App. Juris., pp. 147, 148.

McCullough v. *Commonwealth of Virginia*, 172 U. S. 102, 43 L. Ed. 382.

Chicago B. & Q. R. Co. v. *Illinois*, 200 U. S. 561, 50 L. Ed. 597.

Columbia W. Power Co. v. *Columbia Electric Street R. L. & P. Co.*, 172 U. S. 475, 43 L. Ed. 521.

St. Paul Gas Light Co., v. *St. Paul*, 181 U. S. at page 148, 45 L. Ed. 791.

Kansas S. R. Co. v. *C. H. Alber's Commission Co.*, 223 U. S. 573, 56 L. Ed. 557, 566.

Atlantic Coast Line R. Co. v. *Goldsboro*, 232 U. S. 548, 58 L. Ed. 721.

Russell v. *Sebastian*, 233 U. S. 195, 58 L. Ed. 912.

In the case of *Chicago B. & Q. R. Co.* v. *Illinois*, 200 U. S. 561, 50 L. Ed. 597, commissioners appointed under the Drainage Act of July 1, 1885, sought by mandamus to force the railroad company to construct certain culverts and bridges pursuant to the terms of that act. The railroad refused to comply with the demand of the commissioners, and in the subsequent litigation took the position that the said statute could not be applied without taking its property for public use without compensation, and, therefore, depriving it of property without due process of law, guaranteed by the Constitution of the United States.

The Supreme Court of the State of Illinois did not refer in its opinion to the Constitution of the United States, nor pass upon the constitutionality of the Drainage Act, and concluded its opinion as follows:

> "Entertaining the views above expressed, and founding our conclusion upon the rights and duties of the parties as found in the common law, we deem it unnecessary to pass upon the constitutionality of Sec. 40½ of the farm drainage act." (212 Ill. 120, 72 N. E. 225.)

The opinion of the U. S. Supreme Court is in part as follows:

> "The contention is that as the State court based its judgment on the common-law duty of the railway company, and not expressly on any Federal ground, it cannot be said that there was any denial of the Federal right claimed by the company; consequently, it is argued, this court is without jurisdiction to re-examine the final judgment. Rev. Stat. Sec. 709, U. S. Comp. Stat. 1901, p. 575.

Undoubtedly, the general rule is that where the judgment of the State court rests upon an independent, separate ground of local or general law, broad enough or sufficient in itself to cover the essential issues and control the rights of the parties, however the Federal question raised on the record might be determined, this court will affirm or dismiss, as the one course or the other may be appropriate, without considering that question. But it is equally well settled that the failure of the State court to pass on the Federal right or immunity specially set up, of record, is not conclusive, but this court will decide the Federal question if the necesary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law. And such plainly was the effect of the judgment in this case. If as the railway company contended, the proposed action of the drainage commissioners would deprive it of property without due process of law and also deny to it the equal protection of the laws, then a judgment should have been rendered for the company. And that result could not be avoided merely by silence on the Federal question, and by placing the judgment on some principle of the common law. The constitutional grounds relied on must, if sustained, displace or supersede any principle of general or local law which, but for such grounds, might be sufficient for the complete determination of the rights of the parties. The claim of a Federal right or immunity specially set up from the outset went to the very root of the case and dominated every part of it. If that claim be valid, then the law is for the railway company; for

the supreme law of the land must always control. Therefore, a failure to recognize such Federal right or immunity, and the decision of the case on some ground of general or local law, necessarily has the same effect as if the claim of Federal right or immunity had been expressly denied. That claim, having, then, been distinctly set up by the company, and being broad enough to cover the entire case, it may not be ignored, and this court cannot refuse to determine whether the alleged Federal right exists and is protected by the Constitution of the United States. If the case had been decided in favor of the railway company on some ground of local or general law, then the claim of a Federal right would have become immaterial, and we could not have reexamined the judgment. But the decision was otherwise, and was, in law, a denial of the claim of a Federal right."

Where the judgment of the State Court—though it may not refer to the Constitution of the United States, by necessary operation, rejects the claim set up by the plaintiff in error under the contract, laws of the Constitution and the laws prohibiting a State from depriving anyone of his property without due process of law, the Federal Supreme Court will take jurisdiction.

West Chic. Street R. Co. v. *Illinois*, 201 U. S. 506, 50 L. Ed. 845.

In the case of *Columbia W. Power Co.* v. *Columbia Electric Street R. L. & P. Co.*, 172 U. S. 475, 43 L. Ed. 521, the facts, briefly stated, were as follows:

The Board of Trustees of the Columbia Canal, acting pursuant to authority vested in them by act of the legisla-

ture enacted December 24, 1887, leased certain water power to the plaintiff company. On May 26, 1892, the State entered into a contract with the defendant company, which the plaintiff contended impaired the obligation of the contract arising by virtue of said lease. A bill in equity was filed by the plaintiff company to enjoin the defendant from using certain of its water power, etc., claimed to have been included in its original lease. A preliminary motion was made to dismiss the writ of error, upon the ground that no Federal question was involved. After referring to the opinion of the Supreme Court of the State of South Carolina, Mr. Justice Brown said in part:

> "While, in so holding, the court disposed of the case upon the construction of the contract under which the plaintiff asserted its right, such construction is not less a Federal question than would be the case if the construction of the contract were undisputed, and the point decided upon the ground that the subsequent act confirming the contract with the defendant did not impair it. The question in either case is whether the contract has been impaired, and that question may be answered either by holding that there is no contract at all, or that the plaintiff had no exclusive rights under its contract, or, granting that it had such exclusive rights, that the subsequent legislation did not impair it. There are rather differences in the form of expression than in the character of the question involved, and this court has so frequently decided, notably in the very recent case of *McCullough* v. *Virginia*, 172 U. S. 102 (ante, 382,) that it is the duty of this court to determine for itself the proper construction of the contract upon which the plaintiff relies, that it must be considered no longer as an open question. *New Or-*

leans Water Works Co. v. *Louisiana Sugar Ref. Co.* 125 U. S. 18 (31:607); *Bridge Proprietors* v. *Hoboken Land and Improv. Co.*, 1 Wall. 116 (17:571.)

The case of *McCullough* v. *Commonwealth of Virginia*, 172 U. S., 102, 43 L. Ed. 382, is apparently decisive of the question. The question involved the validity of the coupon provision of the act of the General Assembly of Virginia, passed March 30, 1871. The decisions of the Supreme Court of Appeals of Virginia have uniformly been against the validity of this act. In the *McCullough case*, as here, it was earnestly insisted. *First*, that the construction placed by the Court of Appeals of Virginia upon the act should be adopted by the Federal Court; *Second*, that the Supreme Court of the United States should not assume jurisdiction of the question for the reason that the Court of Appeals of Virginia, in its opinion did not consider the subsequent legislation passed by the State with a view of impairing the contract created by the act of 1871, but limited itself to a consideration of that act. Mr. Justice Brewer delivered an able and exhaustive opinion and discussed the principal cases, if not all of the cases previously decided by this Court, bearing on these points.

As to the first position mentioned above taken by counsel for the State of Virginia, he said in part:

> "It is insisted that whatever may be our own opinions upon the case, we are to take the construction placed by the Court of Appeals of Virginia upon the act as the law of that State. While it is undoubtedly the general rule of this court to accept the construction placed by the courts of a State upon its statutes and Constitution, yet one exception to this rule has always been recognized, and that in reference to the matter of contracts alleged to have been

impaired. This was distinctly affirmed in *Jefferson Branch Bank* v. *Skelly*, 1 Black 436, 443 (17:173, 177), in which the court, speaking by Mr. Justice Wayne, gave these reasons for the exception: 'It has never been denied, nor is it now, that the Supreme Court of the United States has the appellate power to reverse the judgment of the supreme court of a State, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the States from pasing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular State legislation, if this court could not decide, independently of all adjudication by the supreme court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the supreme court of a State? It never was intended, and cannot be sustained by any course of reasoning, that this court should, or could with fidelity to the Constitution of the United States, follow the construction of the supreme court of a State in such a matter, when it entertained a different opinion.' The doctrine thus announced has been uniformly followed."

Mr. Justice Brewer disposed of the second point as follows:

"It is urged that this court has no jurisdiction of this case for the reason that the court of appeals in its opinion does not consider the subsequent legislation passed by the State with the view of impairing the contract created by the act of 1871, but limits itself to a consideration of that act, and adjudges it void.

It is true the court of appeals in its opinion only incidentally refers to statutes passed subsequent to the act of 1871, and places its decision distinctly on the ground that that act was void in so far as it related to the coupon contract, but at the same time it is equally clear that the judgment did give effect to the subsequent statutes, and it has been repeatedly held by this court that in reviewing the judgment of the courts of a state, we are not limited to a mere consideration of the language used in the opinion, but may examine and determine what is the real substance and effect of the decision.

Suppose, for illustration, a State legislature should pass an act exempting the property of a particular corporation from all taxation, and that a subsequent legislature should pass an act subjecting that corporation to the taxes imposed by the city in which its property was located, and that, on the first presentation to the highest court of the State of the question of the validity of taxes levied under and by virtue of this last act, that court should in terms hold these city taxes valid notwithstanding the general clause of exemption found in the prior statute. In that event no one would question that this court had jurisdiction to review such judgment, and inquire as to the scope of the contract of exemption created by the first statute. Suppose further, that this court should hold that the first statute was valid

and broad enough to exempt from all taxation, city, as well as State, and adjudge the last act of the legislature void as in conflict with the prior; and that thereafter the city should again attempt to levy taxes upon the corporation, and that upon a challenge of those taxes the State court should say nothing in respect to the last act, but simply rule that the original act exempting the property of the corporation from taxation was void, could it fairly be held that this court was without jurisdiction to review that judgment, a judgment which directly and necessarily operated to give force and effect to the last statute subjecting the property to city taxes? Could it be said that the silence of the State court in its opinion changed the scope and effect of the decision? In other words, can it be that the mere language in which the State court phrases its opinion takes from or adds to the jurisdiction of this court to review its judgment? Such a construction would always place it in the power of a State court to determine our jurisdiction. Such, certainly, has not been the understanding, and such certainly would seem to set at naught the purpose of the Federal Constitution to prevent a State from nullifying by its legislation a contract which it has made, or authorized to be made. * * * * * Now, it is one of the duties cast upon this court by the Constitution and law of the United States to inquire whether a State has passed any law impairing the obligation of a prior contract. No duty is more solemn and imperative than this, and it seems to us that we should be recreant to that duty if we should permit the form in which a State court expresses its conclusions to override the necessary effect of its decisions."

As to the second contention that the State court did not pass on the validity of the act incorporating the city of Newport News and that this Court is, therefore, without jurisdiction, it is submitted that where it sufficiently appears that the question of impairment of contract obligation was raised in the State court, and that the highest court of the State *gave effect* to the subsequent legislation, a case is properly presented for review on a writ of error and it is the duty of the United States Supreme Court to determine for itself whether a contract existed and whether its obligation had been impaired.

Zoline's Fed. App. Juris., p. 160, Sec. 78.

A constitutional question is presented where the claim is made that a State statute as administered and interpreted by the highest court of the State violates the guarantees of the Federal Constitution, although the statute as written may be free from that objection.

Zoline's Fed. App. Juris., p. 154.

McCullough v. *Commonwealth of Virginia*, 172 U. S. 102, 43 L. Ed. 382.

Detroit United Railway v. *Michigan*, 242 U. S. 268, 61 L. Ed. 238.

As said by Mr. Justice Pitney in the case last cited:

> "But in cases of this character, the jurisdiction of this Court does not depend upon the form in which the legislative action is expressed, but rather upon its practical effect and operation as construed and applied by the State court of last resort, and this irrespective of the process of reasoning by

which the decision is reached, or the precise extent to which reliance is placed upon the subsequent litigation."

In the case at bar, the plaintiff in error was granted a lease of certain oyster planting ground by the State of Virginia, which gave him in terms exclusive right to use said ground for planting oysters, subject only to the right of fishing and navigation. Afterwards, the legislature passed an act incorporating the city of Newport News and giving the said city the right to build a sewer system. Without authority from the legislature of Virginia, the city of Newport News had no right to construct this sewer system, and the necessary operation and effect of such construction was to damage and destroy the plaintiff's property. Now, the language of the oyster law invoked by the plaintiff is so plain that it needs no interpretation. It in terms gives the exclusive right, subject only to the exceptions stated. Can the State court, by basing its decision upon a supposed principle of the common law, take away the jurisdiction of this Court? If so then, as suggested by Mr. Justice Brewer in the *McCullough case, supra,* such a construction would always place it in the power of a State court to determine the jurisdiction of the United States Supreme Court.

CONSTRUCTION OF SEWERS IN ELIZABETH CITY COUNTY.

It will be noted that the original act of January 16, 1896, only authorized the city of Newport News to build or acquire sewers *within* the said City. (Rec. p. 33.)

The act of March 14, 1908, authorized the city to make, erect and construct, within or without said city, drains, sewers and public ducts, and to acquire within or without

said city or town, by purchase, condemnation or otherwise, so much land as may be necessary to make, erect, construct operate and maintain the same.

The additional sewers complained of in the amended bill of complaint (Rec. p. 34) were constructed, pursuant to this act of 1908, without said city and in the county of Elizabeth City.

Counsel for Darling have raised the point that the city of Newport News had no authority, under the act of 1896 to build these sewers without the limits of the city and in the county of Elizabeth City (Rec. pp. 11 and 12), and the majority opinion of the Supreme Court of Appeals (Rec. p. 44) emphasized the fact that under the act of 1908, the said city was authorized to construct sewers beyond the city limits.

It thus appears that after the reassignment of the leases to the plaintiff in error in 1903 and 1905, respectively, for a period of twenty years, the legislature in 1908 passed an act authorizing the construction of these sewers in the county of Elizabeth City. It was the laying of these additional sewers in the county of Elizabeth City that necessitated this litigation.

QUESTION NOT RAISED IN THE STATE COURT.

As hereinbefore suggested, the contention made by counsel for defendant in error, that the property in controversy was not open and eligible for the planting of oysters between the years 1902 and 1910, and argued on pages 14 to 18 of his brief, is now raised for the first time in this court. It was not assigned as one of the ground of demurrer in the lower State court (Rec. p. 38), nor raised in the argument in the Supreme Court of Appeals. There was no disagreement between the Judges of the Virginia Court as to the statutes applicable to the case of the plaintiff in er-

ror, or that he had duly acquired his oyster planting by virtue of leases made in accordance with the law invoked by counsel for plaintiff in error. This clearly appears from the two opinions.

Counsel for defendant in error frankly states that his argument embraced on pages 14 to 18 of his brief, is now presented for the first time.

Under these circumstances, it is well settled that this Court will not consider this point.

Zoline's Fed. App. Juris., p. 145, Sec. 38.

Bullen v. *Wisconsin*, 240 U. S., 625, 36 Sup. Ct. Rep. 473, 60 L. Ed. 830.

Chicago, B. & Q. R. R. Co. v. *R. R. Comm. of Wisconsin*, 237 U. S. 220, 59 L. Ed. 926.

Illinois Central R. R. Co. v. *Mulberry Hill Coal Co.*, 238 U. S. 275, 35 Sup. C .tRep. 760, 59 L. Ed. 1306.

It might well be said in this case as was said by Mr. Justice McKenna in the case of *Chicago B. & Q. R. R.* v. *Comm., supra* (wherein it was contended by defendant in error that a certain statute amended another statute): "If the Supreme Court of the State had so thought, it would have accepted this short way to the decision of the question and not have occupied itself with other and more complex questions."

ACT 1910, P. 543, *Sec.* 13.

It is contended by counsel for defendant in error on page 19 of his brief that the State had no right to lease this oyster planting ground to Darling because the said ground lies in front of and adjacent to the city of Newport News, and that the act above cited, therefore, forbids such lease.

As a matter of fact the land does not lie in front of and adjacent to the city of Newport News, but on the contrary, in front of and adjacent to the county of Elizabeth City; and there is nothing whatever in the bill to justify the assumption of opposing counsel.

Moreover, the said act is not susceptible of the construction placed upon it by counsel for the defendant in error. Our reasons for this conclusion are set out on pages 15 and 16 of the record wherein our argument on this point is set out.

UPON THE MERITS.

The majority opinion of the Virginia Court held that the city of Newport News had the absolute right, under the *common law*, to dispose of its sewage in the manner set out in the amended bill of complaint.

Manifestly, the common law is the same in Virginia as it is in other States of the American Union. With the exception of the decision of the Virginia Court, it is not believed that any case can be found, or any text writer cited which supports the doctrine that a municipal corporation can take and destroy private property for the purpose of establishing a sewer system, without providing just compensation to the owner. We will not attempt to reiterate the authorities which are cited in the brief of counsel for plaintiff in error (copied in the record pp. 11 to 23 inc.) and also in the dissenting opinion of Judge Sims (Rec. pp. 44 to 56 inc.)

Moreover, in said dissenting opinion, every case cited in the majority opinion is discussed at length by Judge Sims and the conclusion reached by him that same do not justify the conclusion reached by the majority. For the most part, the cases cited in the majority opinion are cases wherein

the Federal right of navigation was held to be superior to the right of the oyster planter—a doctrine conceded by counsel for plaintiff in error.

The majority opinion cites the act of 1916, p. 51, which went into effect on July 1, ~~1915~~ 1916. This act provides certain fines and penalties for the use of oysters taken from polluted areas (Rec. p. 44). The bill in this case was filed on January 17, 1916 (Rec. p. 23), six months before the act was passed, and in no event can counsel for plaintiff in error conceive how this act could affect any issue in this case.

It is respectfully submitted that the demurrer of the city of Newport News to the amended bill of complaint should have been overruled.

Respectfully submitted,

JONES & WOODWARD,
JOHN WINSTON READ,
Counsel for Plaintiff in Error.

No. 600

Supreme Court of the United States

FRANK W. DARLING, Plaintiff in Error,

v.

CITY OF NEWPORT NEWS, Defendant in Error.

FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF OF COUNSEL FOR DEFENDANT IN ERROR

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Supreme Court of the United States

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FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF OF COUNSEL FOR DEFENDANT IN ERROR

STATEMENT OF CASE

The first authorization by the Legislature of Virginia of the renting of beds of navigable waters suitable for the planting of oysters was in 1873 (Acts 1872-3, page 310), whereby the owner or occupier of land having a waterfront suitable for planting oysters, might obtain a location thereon for the planting of oysters exclusively for family use; and it was further provided that any resident of the State might apply for and lease other portions of the beds and shores of the bays, rivers and shores of the sea for a term of one year, subject to renewal. This act as to the leasing of the beds of the bays, rivers and shores of the sea was repealed by an act of the General Assembly of Virginia of 1874, page 238, wherein it was stated that "all the beds of all the bays, rivers and creeks and the shores of the sea, within the

jurisdiction of the Commonwealth, and not conveyed by special grant or compact, according to law, shall continue and remain the property of the Commonwealth of Virginia, and may be used as a common by all the people of the State, for the purpose of fishing and fowling, and the taking and catching of oysters and other shellfish, subject to the reservations and restrictions therein contained."

This remained the law until March, 1882, when by an act of the General Assembly of Virginia, approved March 6th, 1882, Acts 1881-2, page 249, Hampton Flats, as therein described, part of which is the subject of this litigation, was opened and made eligible for the planting of oysters for a perior of twenty years from the passage thereof, subject to the provisions therein contained and future legislation, and the part so assigned to be vested in such person for the period of one year with the privilege of renewing the same from year to year upon such terms as may be prescribed by law while this act was in force.

By the Acts of the General Assembly of Virginia 1883-84, page 144, it was provided that the residue of the waterfront in excess of what was reserved for the riparian owner (one-half acre), and the residue of the bays, rivers, and creeks, other than natural oyster beds or rocks, may be occupied by any citizen for the purpose of planting or propagating oysters thereon.

This Act of 1883-84, and the Act of 1881-82 dealing specifically with Hampton Flats, were both carried into the Virginia Code of 1887, the one known as Section 2137, and the other 2138 and 2139.

The part of Section 2137 pertinent hereto is:

"The residue of said waterfront in excess of what is herein reserved for the riparian owner, and the residue of the beds of the bays, rivers and creeks, other than natural oyster beds or rocks, may be occupied by any person for the purpose of planting and propagating oysters thereon. It shall be the duty of any such person desiring to obtain a location for planting or propagating oysters on any portion of the waterfronts and beds aforesaid not located or reserved as hereinbefore provided for owners and occupants of the land aforesaid, to apply to an inspector to have his location ascertained and designated, and the same shall be marked with suitable stakes, or by other metes and bounds agreed upon between the applicant and the inspector, and he shall pay the inspector for his services a fee of one dollar, and also an annual rent of twenty-five cents for each and every acre assigned to him, payable annually on the first day of October, and thereafter he shall have the exclusive right to the use of such location so designated for the purpose aforesaid so long as he complies with the provisions requiring the payment of twenty-five cents per annum for every acre so occupied, subject, however, to the right of revocation by the General Assembly.'

Section 2138 provides:

"The preceding section is qualified by this and the following section. All that portion of Hampton Flats and the grounds thereof, lying in and adjacent to the County of Elizabeth City" (the said ground is here described accurately and is the

subject of this litigation) "shall continue open and eligible to residents of this State for the sowing or planting of oysters for the period of twenty years from the fourth day of March, 1882, subject to the provisions of the following section:"

Section 2139:

"Any resident of this State, desiring to sow or plant oysters on any portion of the said flats or grounds, shall make application therefor to an inspector for the county in which such portion or any part thereof is situated, or to which it is adjacent, stating as near as may be the quantity of oysters proposed to be sowed or planted; and thereupon the said inspector shall assign to the applicant such portion of said flats or grounds agreed upon by them, as may be necessary for the quantity of oysters so proposed to be sowed or planted. Such person shall cause the portion thus assigned to be marked and laid off with suitable stakes, according to said assignment; and thereafter the exclusive right of sowing or planting oysters on the grounds so assigned shall be vested in such person for the period of one year, with the privilege of renewing the same from year to year, but not beyond the period limited by the preceding section, and subject to such legislation by the General Assembly as it may deem proper. Where any of the said flats or grounds are used or occupied by a resident of this State for the sowing or planting of oysters, the inspector, in making assignment therefor, shall give preference to the person so using or occupying the same."

Thus it will be seen the renting of Hampton Flats was limited to a period of twenty years from the fourth day of March, 1882, the lessee to take for a period of one year with the privilege of renewing the same from year to year, but not beyond the period of twenty years, and subject to such legislation by the General Assembly as it may deem proper.

Section 2137 has been several times amended, but Sections 2138 and 2139, which authorized the renting of Hampton Flats, has not been amended or repealed unless it were by implication in 1910, when all the oyster laws of Virginia, by act approved March 17th, 1910, Acts 1910, page 543, were revised, amended and consolidated into one act, and all acts and sections of the Code in conflict therewith repealed, but this act does not specifically mention Hampton Flats sections.

Section 9 of that act dealing with the rights of renters, provides that the State will guarantee the absolute right to the renter to continue to use and occupy such grounds for the period of twenty years from the date of the assignment, subject only to the right of fishing in the water above the said bottom * * * and if the applicant shall hold the said grounds for the full period of twenty years, and at the expiration thereof shall desire to continue to hold the same and to renew such lease, then provided such ground is still open to lease under the then existing law, such applicant shall have prior right over all applicants for a re-assignment of the ground, *subject to any such laws or regulations as the General Assembly may enact or prescribe* and to such rental as may then

be fixed by law. Also should any lessee of oyster planting grounds or bathing grounds have his ground or portion thereof re-surveyed or re-assigned, such re-survey or re-assignment in part or in whole, shall not be construed to be a new assignment of such grounds, but shall be deemed to be a continuation of the original assignment subject to all the limitations and conditions under which such grounds were originally assigned.

The allegations of the bill in this case show the first assignment of a portion, to have been made in 1884, and re-assigned in 1903, and another portion to have been first assigned in 1885, re-assigned in June, 1905, with the last re-assignment November 6th, 1912. (Rec. p. 32.) Also that the City of Newport News was incorporated in 1896, built some sewers in 1900, and others in 1907. (Rec. p. 32.)

JURISDICTION

The first question to be determined in this case is the jurisdiction of this Court. This Court, under the act of Congress approved September 6th, 1916, takes jurisdiction of such a case, as we have here, only where there is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity.

The Court is asked to dismiss the writ of error for the reasons:

(1) The validity of no act of the State legislative authority repugnant to the Constitution of the United States has been passed upon or upheld.

(2) No Federal question was decided by the State Court.

(3) The decision of the State Court is sustainable upon non-Federal grounds.

(4) The Federal question raised is without merit.

NO STATE STATUTE UPHELD IN VIOLATION OF THE CONSTITUTION

Where Federal jurisdiction is claimed upon writ of error to a State Court on the ground that the obligation of a contract has been impaired, it can be invoked only when some Legislative Act is repugnant to the Constitution of the United States. As has been repeatedly held by this Court, the State Court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold the contract void which, in the opinion of this Court, is valid; it may adjudge a contract to be valid which, in the opinion of this Court, is void, or its interpretation of the contract may, in the opinion of this Court, be radically wrong, but in none of such cases would the judgment be reviewable by this Court under the clause of the Constitution protecting the obligations of contract against impairment by State Legislation.

Central Land Co. v. Laidley, 159 U. S. 103.

The jurisdiction of this Court is dependent upon and must rest on some Legislative act of the State, or its subdivisions to give it jurisdiction.

New Orleans Water Works Co. v. Louisiana Sugar Ref. Co., 125 U. S. 18-30; and cases cited.

In Los Angeles F & M. Co. v. Los Angeles, 217 U. S. 217, it as claimed that State statutes had undertaken to confer water rights upon the city, and were given such effect in violation of the Federal rights of the riparian owner, and it was held that that claim would not serve as a basis for a writ of error, as the State Court held that the municipal rights were not determined by the effect of State statutes, but under rights and title of Spanish and Mexican law.

In the case at bar the Court held the city received its rights under the common law as adopted in this State.

By reference to the opinion of the Court of Appeals of the State of Virginia (Rec. p. 41), it will be seen that no where has the act of January 16th, 1896, incorporating the City of Newport News, been held to be in conflict with, to repeal, abrogate or render invalid any act of the Legislature of Virginia authorizing and permitting the plaintiffs in error to hold the oyster lands claimed in his bill. That Court does not uphold the validity of any act of the Legislature of Virginia taking or depriving the plaintiff in error of his property without just compensation, in conflict with the fourteenth amendment of the United States Constitution, as claimed in the petition or assignments of error of the plaintiff in error. Nor does the Court refer to or base its opinion upon any act of the Legislature of Virginia which impairs the obligation of any contract it may have with the plaintiff in error, as

forbidden by Section 10, Article 1 of the Constitution of the United States.

Counsel cite Myles Salt Co. v. Board of Commisioners, 239 U. S. 478, and Detroit United Railway Co. v. Mich., 242 U. S. 232, that this Court will take jurisdiction upon the Federal question raised.

An examination of those case will show that the opinion in each case was based upon the authority exercised under subsequent acts of the Legistlature of the State, and are therefore not in conflict with the prior decisions of this Court, but in keeping therewith.

NO FEDERAL QUESTION DECIDED

The opinion shows that the Court based its decision upon another and independent ground and broad principle that the rights of the public, the city clearly existed before the enactment of the oyster laws, and that the Legislature of the State in enacting the oyster laws did not intend to, nor did it destroy the ancient and undoubted prior right of the public to empty its sewers into the sea, the natural receptacle thereof.

The common law so far as it is not repugnant to the principles of the bill of rights and the Constitution of Virginia, except where it has been altered by the General Assembly, is now, and always has been, in full force and is the rule of decision in Virginia.

Code of Virginia 1887, Section 2.

It is clearly within the sole province and jurisdiction of the State Court to say whether the common law is in

conflict with the Bill of Rights, the State Constitution, or repealed by statute.

This decision as it will be seen is based upon the common law rights of the public, and decides that they have not been limited or taken away by the oyster laws under which the plaintiff claims.

The State Court not having upheld the validity of any statute impairing the rights of the plaintiff, but at most only construing the oyster laws, as not repealing the common law of the State. It is the construing of a statute and not the assailing that is passed upon by the State Court.

As was said in Erie R. R. Co. v. Hamilton, Treasurer, et al., decided January 7th, 1919, No. 6 Supreme Court Sup. p. 118, in dismissing a writ of error from the State Court for want of jurisdiction:

> "The distinction between assailing the validity of a treaty or of a statute, and relying upon a special construction of either is patent, and has been the subject of such full discussion by this Court that it should not now be considered either doubtful or obscure," and cases cited.

DECISION SUSTAINABLE ON NON-FEDERAL GROUNDS

It cannot be said that the Supreme Court of Virginia was evading the question to prevent jurisdiction of this Court, for the reason that it has previously held that a City of the Commonwealth of Virginia situate on an arm of the sea adjacent to tidal waters, has the right

to use such waters for the purpose of carrying off its refuse and sewerage to the sea, so long as such use does not create a public nuisance, and any injury occasioned thereby to private oyster beds is *damnum absque injuria.*

Hampton v. Watson, 119 Va. 95.

It was further held in that case construing the laws, constitutions and acts of the State of Virginia, that the State holds in trust for the public its land under tidal waters, and it could not be granted or aliened to an individual so as to impair the public interest therein, or use thereof, including that of emptying its sewers therein. Following and citing as authority therefor the decision of this Court in Illinois Cent. R. R. Co. v. Illinois, 146 U. S. 387.

This decision is based on other grounds independent of construing the Act of 1896 incorporating the City of Newport News as in violation of the rights of the plaintiff in error under the laws of Virginia to plant oysters on Hamtpon Flats, and broad enough to maintain the judgment sought to be reviewed, and shows that the Court could and did decide upon the great broad principle of the ancient and inalienable rights of the public to empty its sewers into tidal, salt, nivagable waters. Such being the case, it is well settled that this Court will not look into the Federal question (which we deny is involved), and will dismiss the writ of error.

Bacon v. Texas, 163 U. S. 207-227;
Eustis v. Balles, 150 U. S. 361-370.

In DeSaussure v. Gaillard, 127 U. S. 216-233, it was held that where it appears by the record that the judgment of the State Court *might* have been based either on a law which would raise a question of constitutional repugnancy, etc., or upon independent grounds; and it appears in fact, the Court did base its judgment on such independent ground, and not on the law raising a Federal question. This Court will not take jurisdiction of the case, even though it might think the position of the State Court unsound.

See also:

Cook Co. v. C. & C. Canal Co., 138 U. S. 635;
Rutland Ry. Co. v. Central of Vermont, 159 U. S. 389-393.

The Federal question was not cessary to the determination of the cause:

California G. P. Works v. Davis, 151 U. S. 389-393.

FEDERAL QUESTION RAISED WITHOUT MERIT

Counsel for plaintiff in error set out numerous assignments of error, insisting that the Court of Appeals of Virginia construed the act of the Legislature of Virginia, approved January 16th, 1896, incorporating the City of Newport News, as taking and damaging the plaintiff's property in violation of Article 1, Section 10, of the Constitution of the United States, and as a violation of the fourteenth amendment of said Constitution.

We insist that that Court did not pass upon or construe that act as impairing the obligation of a contract, or of taking the plaintiff's property without due process of law. It is well settled in this Court that the questions passed upon by the State Court must appear from that decision, and may not be enlarged for the purpose of obtaining a writ of error by assignments of error setting up the Federal question.

C. & P. Ry. Co. et als. v. Cleveland, 235 U. S. 50; Sawyer v. Piper, 189 U. S. 154.

It is also a settled qusetion that where a party who seeks and is given an opportunity in the State Court to liquidate his rights, cannot have a judgment reviewed by this Court on the ground of due process of law, because he was not successful in his litigation.

Remington Paper Co. v. Watson, 173 U. S. 443.

The decision in this case was based upon the general law of the State. The claim that the plaintiff in error was denied due process of law is without merit, and the writ should be dismissed.

Consolidated Turnpike Co. v. N. & O. Ry. Co., 228 U. S. 596-602.

The State Court in this case construed the meaning and intent of the oyster statutes, and whether those statutes by words or intent, abridged, limited or repealed the rights of the public in the lands under the tidal, navi-

gable waters. If this Court were to assume jurisdiction of the case, it is then, that the question submitted for its decision would not be whether the act incorporating the City of Newport News was repugnant to the Constitution of the United States, but whether the Court of Appeals of the State of Virginia had erred in its construction of the oyster laws.

It is the peculiar province and privilege of State Courts to construe their own statutes, and is no part of the function of this Court to review their decisions or assume jurisdiction over them on the pretense that their judgments had impaired the obligation of contracts.

> Commercial Bank of Cin. v. Buckingham Ex., 5 How. 317-342.

Wherein the Court held the power delegated to this Court is for the restraint of unconstitutional legislation by the States, and not for the correction of alleged errors committed by their judiciary.

FEDERAL QUESTION WITHOUT MERIT UPON FACE OF STATUTES

The Federal question sought to be raised is without merit, for the further reason that Sections 2138 and 2139 of the Code of Virginia, 1887, above quoted, expressly limited the leasing of Hampton Flats and planting oysters thereon from year to year, for the term of twenty years, which expired March 4th, 1902. So that the plaintiff claiming under that act, (the only one under which the right to plant oysters on Hampton Flats has been grant-

ed) his rights were from year to year, and subject to such legislation as the General Assembly of Virginia might deem proper, including the incorporation of the Cty of Newport News, and expired in 1902; since which time Hampton Flats has not been open and eligible for the planting of oysters thereon, unless it be the Act of 1910, which sought to revise, amend and consolidate into one act certain laws relating to oysters, fish, etc., and to repeal all acts or parts of acts of the General Assembly, and any section or sections of the Code in conflict with the provisions thereof, which act does not refer to Sections 2138 or 2139 of the Code, or to Hampton Flats.

And if the plaintiff leases under the Act of 1910, there has been a lapse of eight years in which Hampton Flats were not open and eligible for the planting of oysters, which Act of 1910 is subsequent to the Act of 1896 incorporating the City of Newport News and the Act of 1908, page 623, authorizing cities to extend their sewers beyond the corporate limits; and any rights acquired by the plaintiff under the Act of 1910 could not supersede but was subject to the rights of the City under the previous Acts of 1896 and 1908.

N. N. S. & D. D. Co. v. Jones, 105 Va. 503.

Counsel, however, claim that Section 9 of the Act of 1910, page 547, which contains the following clause:

> "Should any lessee of oyster planting grounds or bathing grounds, have his grounds or any portion thereof re-surveyed or re-assigned, such resurvey or re-assignment, in part or in whole, shall not be construed to be a new assignment of such grounds, but shall be deemed to be a continuation

of the original assignment, subject to all the limitations and conditions under which such grounds were originally assigned."

And which appears for the first time in any oyster law, dates their lease back to the original assignment of 1884 and 1885. This clause having been passed subsequent to the rights acquired by the city, clearly cannot now take away those vested rights, for it is shown that the city constructed its sewers in 1900 and 1907.

In the first place, we do not concur in that construction of that clause, and contend when read in connection with the preceding part of the section, which deals with new assignments to the lessee, that the quoted clause means only that when any lessee has his grounds re-surveyed or re-assigned, by reason of any question, dispute, mistake or irregularity, during his term of twenty years, that the re-survey and re-assignment to correct any such question, mistake or irregularity shall not be deemed a new assignment for a new term of twenty years from that date, but a continuation of the assignment under which he held before the re-survey.

But admitting for the sake of argument, the construction put upon that clause by counsel for the plaintiff to be the correct one, the plaintiff would at most then hold under the wording, limitations and conditions under which such grounds were originally assigned to him, which is Sections 2138 and 2139 of the Code, above set out (the lands being on Hampton Flats), and wherein it is provided that the lessee holds "*subject to such legislation by the General Assembly as it may deem proper.*"

The Legislature having subsequently incorporated the city and authorized it to construct sewers, which it did in 1900 and 1907, the plaintiff in error would hold subject to that legislation by the General Assembly; the right being reserved to enact such legislation the obligation of no contract is impaired thereby.

Pa. College Cases, 13 Wall. 190-213;
Spring Valley Water Works v. Schottler, 110 U. S. 347-355;
See also: Purcell v. Conrad, 84 Va., 557-572, dealing with oyster laws of Virginia.

Section 2137, as will be seen, is a general statute and deals with the residue of the beds, bays, rivers and creeks other than the natural oyster beds or rocks, and the half acre assigned to riparian owners; while Sections 2138 and 2139 expressly qualify Section 2137, and specifically deals with Hampton Flats, without reserving to riparian owners the one-half acre, or considering whether or not it be natural oyster beds or rocks.

Clearly the several amendments of General Statute 2137 do not amend or repeal the special statutes, Sections 2138 and 2139. It is axiomatic that repeals by implications are not favored, and the well settled doctrine is that laws, special and local, in their application are not repealed by general legislation, except upon the clearest manifestation of the intent by the Legislature to effect such repeal, and ordinarily an express appeal by some intelligent reference to the special act is necessary to accomplish that end.

Trehy v. Mayre, 100 Va. 40;
Chew Heong v. U. S., 112 U. S. 536-549;
36 Cyc. 1090.

In justice to the trial court and the Court of Appeals of Virginia, counsel desires to say that this argument as to the various acts of the General Assembly relative to Hampton Flats, was not presented to or urged before either Court for the reason that the Court of Appeals of Virginia had so recently decided the case of Hampton v. Watson, supra, in which oyster lands not located on Hampton Flats, but near thereto, and subject to like pollution, were the subject of litigation, and the Court of Appeals having decided in that case, that the State held those lands in trust for the benefit of the public, and that they could not be granted or aliened against the public interest; and that the right to empty sewers was a prior and ancient right to that of planting oysters in tidal waters.

It was thought the Hampton case was the law in Virginia and controlled this case.

Since the Court has jurisdiction only when some act of the Legislature is called in question, it is deemed proper that all the acts dealing with oyster planting on Hampton Flats should be called to the attention of the Court.

If counsel claimed under the Act of 1910, under which the most recent assignment was made to them in 1912, wherein they claim certain provisions of the 9th Section are beneficial to them, they are likewise confronted with Section 13 of that act, which contains:

"And provided further that this act shall not apply to any ground lying in front of and adjacent to any city within the Commonwealth."

The fact that the city sewers empty into and pollute these waters, as alleged by them, shows that it is in front of and adjacent to said city; and furthermore, the Court will take judicial cognizance of the location of the City of Newport News, and the Town of Kecoughtan, one on either side of Salters Creek, into which one of the sewers complained of empties.

This section was at one time a separate and independent act dealing with the erection of piers, docks and watch houses, and was first enacted at the session of the General Assembly of Virginia, 1902-3-4; but upon revision, amendment and consolidated into one act all the oyster laws by the Act of March 16th, 1910, was brought into the revised, amended and consolidated oyster laws *totidem verbis*.

The rule of construction with reference to revised and consolidated acts is well expressed in the leading case of Bowen v. U. S., 100 U. S. 508, wherein Mr. Justice Miller, speaking for the Court, said:

"When the meaning is plain, the Court cannot look to the statutes which have been revised, to see if Congress erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning of Congress."

The language of this section, we insist is so clear and explicit that it needs no construction, and the Court must

follow those plain and unambiguous words, and cannot look elsewhere to ascertain if the Legislature of Virginia meant what it said. And therefore the oyster planting grounds in question are not open and eligible for oyster planting purposes, nor does that act revive Section 2138 of the Code, wherein the renting of Hampton Flats was limited to twenty years.

LAW OF THE CASE

Should this Court, however, assume jurisdiction of this cause, and pass upon the law thereof, the position taken by the defendant in error in the State Court, and which we insist is equally applicable in this Court, is that the State owns and holds in trust for the public, the beds of tidal salt, navigable waters of the Commonwealth; that these beds cannot be granted or aliened against the public interest, but any grant or use thereof must be taken subject to such ancient and prior right of the public.

Ill. Cent. R. R. v. Ill., 146 U. S. 387;
Martin v. Waddell, 16 Pet. 367;
Hampton v. Watson, 119 Va. 95;
Taylor v. Com., 102 Va. 767;
Home v. Richards, 4 Call 441-6; 2 Am. Dec. 574;
Coxe v. State, 144 N. Y. 396; 39 N. E. 400.

II

There is a marked and well established distinction between the pollution of non-navigable streams, in which

the riparian owner owns a bed of the stream, and the pollution of large tidal, navigable bodies of salt water, where the Commonwealth owns and holds the bed thereof in its public capacity. In the former case, it might be the taking or damaging of private property for public use. In the latter case, it is using the public property for public purposes; and unless there be offensive odors to make it a public nuisance or a pollution of the beach owned by the individual (and there is neither of such claims in this case), the right to empty sewers into the sea, the natural receptacle thereof, is part of the *jus publicum*.

Sayre v. Newark, 60 N. J. Eq. 361; 45 Atl. 985; 48 L. R. A. 722; 83 Am. St. Rep. 629;
Grey v. Paterson, 45 Atl. 995;
Haskell v. New Bedford, 108 Mass. 208, 214;
Doremus v. Paterson, 55 Atl. 304.

As was said in Merrifield v. Worcester, 110 Mass. 216, 14 Am. Rep. 592, in discussing the pollution of a running stream of water, the Court after discussing the pollution by farm houses and thinly settled country, said:

> "When the population becomes dense, and the towns or villages gather along its banks, the stream naturally and necessarily suffers still greater deterioration. Roads or streets crossing it, or running by its side, with their gutters and sluices discharging into it their surface water collected from over large spaces, and carrying with it in suspension the loose and light material that is thus swept off, are abundant sources of impurity, against which the law affords no redress by action."

If this be the law with reference to streams, with the more right may the city claim this privilege, where the sewers are emptied into the sea, their natural receptacle.

In the most recent New York case, Seamen v. New York, 161 N. Y. Supp. 1002, the Court held the pollution of tidal waters by city sewerage to be *damnum absque injuria,* where a riparian owner had his oyster house so constructed as that the tidal waters ebbed and flowed into the cellar where he kept oysters, saying:

> "No right of his is violated, unless a riparian owner on tidal waters has the right to have the salt water as it is carried to and fro by the tide, kept fit for human consumption. I am not aware that such right has ever been asserted, much less sustained by the Courts."

This case is of special importance for the reason that it does not follow the case of Huffmire v. Brooklyn, relied upon by counsel for the plaintiff in error.

III

This is not a case as counsel mistake, of taking or damaging private property for public use; but on the other hand, it is the legitimate use of public property for public purposes, and which the rights of the public cannot be denied by grant or alienation to an individual.

> "The power of the sovereign State or Nation is perpetual, not exhausted by one exercise; and all privileges granted in such waters are subject to that power, the exercise of which is not a taking

of private property for public use, but the lawful exercise of a governmental power for common good."

Greenleaf-Johnson Lumber Co. v. Garrison, 237 U. S. 251-60;
Willink v. U. S., 240 U. S. 572.

It was said in Lewis Blue Point Oyster Cultivation Co. v. Briggs, 91 N. E. 846, affirmed 229 U. S. 82, where oyster beds were damaged by dredging to deepen the channel in Great South Bay, a part of New York harbor:

> "When any public authority conveys lands bounded by tide waters, it is impliedly subject to those paramount uses to which the Government, as trustee for the public, may be called upon to apply the waterfront for the promotion of commerce and general welfare."

And:

> "Should from public considerations of the highest importance, be held to be made with the implied reservation of the right to freely improve navigation of the great seaport, within the general limits of which said uplands were situate."

So in the case at bar, it is for the general welfare and a great public interest to provide sewerage for and protect the health of the community.

Counsel say the city should provide a purification system to protect their oyster beds. In reply thereto we say, as was said in the case of Morse v. City of Worcester, 139 Mass 389-391:

"If the only mode of preventing pollution of the river is to be found by an adoption of an extensive system of purification independent of the construction of the sewer, requiring the taking of large tracts of land, we must not be understood as implying that it is within the duty or power of the defendant to do this * * * If such system is rendered necessary by the construction of a sewer, the remedy must be sought from the Legislature, which can best adjudge and settle the conflicting rights and interests of the public and of the riparian owners upon the river."

With the more reason in this case, it is for the sovereign power to say the extent of pollution it will permit in its waters, and to settle and adjust the conflicting rights of the public and lessee of its bottoms.

It is well settled that the plan of drainage determining when and where sewers shall be built, of what size and level, and where they shall empty, are *quasi judicial* in nature, and not subject to revision by the Courts.

4 McQuillan Corp. Sec. 1834, and cases cited;
2 Dillion Munic. Corp. (4th Ed.) Sec. 1046;
Johnson v. District of Columbia, 118 U. S. 19.

IV

Counsel cite the case of McCready v. Va. 94 U. S. 391, as authority to grant and alien perpetual rights to the plaintiff for the planting of oysters on Hampton Flats. That was a case in which the State of Virginia forbid others than citizens from taking or catching oysters in the waters of the Commonwealth, and while

the Court does illustrate the planting of oysters to the planting of corn, the question of the right to perpetually grant or alien the land under the water to one of its citizens, in conflict with and against the interests of the public, was not before the Court; but it was the question of whether the State could forbid non-residents of the State from using its public property.

We insist that the opinion of this Court in Ill. Cent. R. R. Co. v. Ill., 146 U. S. 387, where the question was squarely brought before the Court, to be the law upon the subject.

The case of Kellog v. Tazewell, Hurst v. Delaney, and similar Virginia cases cited by counsel, we insist have no bearing upon this case, for those are cases where the question arose between two individual claimants of the same oysters or oyster lands, and is not the question of the rights of the public as against the individual in the use of the public waters, held by the Commonwealth in trust for the benefit of all the people of the Commonwealth, or where the individual takes such rights as are granted him *cum onere* of the *jus publicum*.

Counsel call to the attention of the Court that the opinion of the Court of Appeals of Virginia was not unanimous. Such is shown by the record, but in concluding the dissenting opinion, it was held the injunction should not be granted.

V

It is part of our history that the shores of James River, Hampton Roads and York River, all contiguous to the oyster sections were the scene of the earliest English

settlements on this continent, and the Court will take cognizance that incorporated communities were established on these shores long prior to the planting of oysters in the waters adjacent thereto, in fact in Colonial days. These communities had the right and it is the duty of every municipality in protesting the health of its citizens and the State at large, to construct sewers to carry off the refuse and waste naturally gathering therein.

Can it be that Newport News, first an Indian village, then an English settlement, after the lapse of many years a thickly settled community and finally a city, and used by the Federal government in all of its wars for the encampment of and embarking and debarking of thousands upon thousands of soldiers with hundreds of ships in its waters, should, on account of the long delay in reaching a sufficient growth to be an incorporated community, though this was for almost a century contemplated and predicted by many, be deprived of the privilege that its neighboring towns and cities, situate upon the same waters enjoy, and which is enjoyed by the individual upon the shore, and every ship that traverses these waters? Is the law to be so construed that the congested public have no interest in the tidal waters and beds thereof, and that no future city can be built upon the seaboard?

Such evidently was not the intent of the Legislature of Virginia in leasing the beds of its tidal waters adjacent to thickly settled communities for planting oysters, at one dollar, per acre, per year. The very fact that the General Assembly, by appropriate legislation, is endeavoring to promote deep water oyster planting in

Chesapeake Bay (Acts 1910, page 543, Sec. 7), and which is successful, shows that it was anticipated that the beds of the shoal waters adjacent to its cities and towns would have to give way to commerce and the health and growth of those communities.

As was pointed out in the majority opinion, the Legislature of Virginia (Acts 1916, page 51) prohibited the taking of oysters from polluted areas, except for the purpose of removing them to unpolluted waters. This shows that the Legislature recognized that certain areas were or might be polluted, and its remedy was to purify the oysters growing thereon, rather than to forbid the pollution of those areas by the emptying of sewers therein. Had it thought the oyster renter had a superior right under the lease from the State, it would have forbidden the pollution of the waters, rather than forbid the using of the oysters until purified.

We respectfully submit that there is no Federal jurisdiction for the reason that the Court of Appeals of Virginia based its decision upon non-Federal grounds; that under the acts of the Legislature of Virginia, the plaintiff's rights are subsequent and inferior to the rights of the city; that under the general law of the State, the city is acting within its lawful right in emptying its sewerage into tidal, salt, navigable waters.

J. A. MASSIE,
CITY ATTORNEY.

DARLING *v.* CITY OF NEWPORT NEWS.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 600. Argued April 15, 1919.—Decided April 28, 1919.

Generally speaking, private rights in land under tidal waters are subject to the right of the State to use such waters as a depository for sewage. P. 542.

Plaintiff held oyster beds in the tidal waters of Hampton Roads by leases from the State of Virginia, under whose laws, as long as he paid rent, he was declared to have the "exclusive right to occupy" the land for twenty years, subject to any rights of other persons previously acquired, with the State's guaranty of an "absolute right" to continue to use and occupy it for that period. *Held:* That the grant, construed strictly, with reference to the public necessity in that vicinity and previous pollution of the water, was subject to the right of the State to authorize the City of Newport News to discharge its sewage into the Roads, and that the consequent pollution of the plaintiff's oysters was neither (1) a taking of his property without due process, nor (2) an impairment of his contract rights, nor (3), (following the state court) a damage in the sense of the Virginia constitution, which requires compensation for property taken or damaged for public use. P. 543.

123 Virginia, 14, affirmed.

THE case is stated in the opinion.

Mr. Maryus Jones and *Mr. John Winston Read* for plaintiff in error:

The Virginia statutes give the lessee a property right (*Powell* v. *Tazewell*, 66 Virginia, 786; *McCready* v. *Virginia*, 94 U. S. 391), viz., the absolute and exclusive use and occupancy of this ground for a period of twenty years, with the right to renew for another period of twenty years, upon the same terms and conditions as set out in the original lease from the State. How then can the State afterwards grant to the city the authority to take and destroy this property without providing any compensation whatsoever? It would seem to be plain that such action not only impairs the obligation of the contract previously existing (Cooley's Const. Lim., 6th ed., p. 328; *Fletcher* v. *Peck*, 6 Cranch, 87, 136; *New Jersey* v. *Wilson*, 7 Cranch, 64), but likewise takes property for public use without just compensation, which the requirement of due process of law in the Fourteenth Amendment forbids.

[Counsel relied particularly upon the case of *Huffmire* v. *City of Brooklyn*, 162 N. Y. 584, as practically identical with this, and upon the dissenting opinion in the court below, 123 Virginia, 14, and authorities therein cited.]

Mr. J. A. Massie for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

The plaintiff in error brought this bill in equity to prevent the City of Newport News from discharging its sewage in such a way as to pollute and ruin the plaintiff's oysters upon his beds under the tidal waters of Hampton Roads. A demurrer was sustained by the court of first instance and on appeal by the Supreme Court of Appeals, and the bill was dismissed. 123 Virginia, 14. The material facts are few. The plaintiff holds leases of the beds

from the State. The original ones were made in 1884 and 1885 for twenty years. In 1903, 1905 and 1912 they were what is called reassigned to the plaintiff by what we understand to have been new leases, by statute to be deemed continuations of the original leases. In 1896 the City of Newport News was incorporated with the grant of the right to build sewers, which the City built in the manner complained of. The grant, coupled with Acts of 1908, c. 349, pp. 623, 624, authorizes the present discharge through Salter's Creek into the tide waters of Hampton Roads, with the effect alleged. By § 2137 of the Code of Virginia it is provided that so long as a lessee of oyster beds continues to pay the rent reserved "he shall have the exclusive right to occupy said land for a period of twenty years, subject to such rights, if any, as any other person or persons may previously have acquired." By § 2137a, originally Act of March 5, 1894, c. 743, § 10 (2), Acts 1893–4 pp. 840, 847, while he pays rent as required "the state will guarantee the absolute right to the renter to continue to use and occupy the same for the period of twenty years the renter acquired." The bill alleges that if the statutes purport to authorize the destruction of the plaintiff's oysters they are contrary to the Constitution of the United States and specifically to the Fourteenth Amendment. In the assignment of errors to the Supreme Court of Appeals the statutes are said also to violate the contract clause. Article I, § 10. The jurisdiction of this court is clear.

The fundamental question as to the rights of holders of land under tide waters does not present the conflict of two vitally important interests that exists with regard to fresh water streams. There the needs of water supply and of drainage compete. *Missouri* v. *Illinois*, 200 U. S. 496, 521, 522. The ocean hitherto has been treated as open to the discharge of sewage from the cities upon its shores. Whatever science may accomplish in the future

we are not aware that it yet has discovered any generally accepted way of avoiding the practical necessity of so using the great natural purifying basin. Unless precluded by some right of a neighboring State, such as is not in question here, or by some act of its own, or of the United States, clearly a State may authorize a city to empty its drains into the sea. Such at least would be its power unless it should create a nuisance that so seriously interfered with private property as to infringe constitutional rights. And we apprehend that the mere ownership of a tract of land under the salt water would not be enough of itself to give a right to prevent the fouling of the water as supposed. The ownership of such land, as distinguished from the shore, would be subject to the natural uses of the water. So much may be accepted from the decisions in Virginia and elsewhere as established law. *Hampton* v. *Watson*, 119 Virginia, 95; *Haskell* v. *New Bedford*, 108 Massachusetts, 208, 214; *Marcus Sayre Co.* v. *Newark*, 60 N. J. Eq. 361; *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387, 459.

The question before us then narrows itself to whether the State has done any act that precludes it from exercising what otherwise would be its powers. On that issue we shall not inquire more curiously than did the Supreme Court of Appeals into the statutory warrant for the leases, or go into relative dates, but shall assume, for the purposes of decision, that the plaintiff is a lessee and is entitled to the benefit of the clauses that we have quoted from the Code. But we agree with the court below that when land is let under the water of Hampton Roads, even though let for oyster beds, the lessee must be held to take the risk of the pollution of the water. It cannot be supposed that for a dollar an acre, the rent mentioned in the Code, or whatever other sum the plaintiff paid, he acquired a property superior to that risk, or that by the mere making of the lease, the State contracted, if it

could, against using its legislative power to sanction one of the very most important public uses of water already partly polluted, and in the vicinity of half a dozen cities and towns to which that water obviously furnished the natural place of discharge. See *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387. *Trimble* v. *Seattle*, 231 U. S. 683. The case is not changed by the guaranty in § 2137a. That is directed to the possession of the land, not to the quality of the water. It is unnecessary to cite the cases that have affirmed so frequently that the construction of public grants must be very strict.

The constitution of Virginia, like some others, requires compensation for property taken or damaged for public use. Const. 1902, § 58. But this seems to be construed by the dissenting judge as well as by the court below as not including damage like this, which would not have been a wrong even without the act of the legislature. It is a question that has been subject to much debate. See for example, *Caledonian Railway* v. *Walker's Trustees*, 7 App. Cas. 259, 293, *et seq.* *Taft* v. *Commonwealth*, 158 Massachusetts, 526, 548. *Transportation Co.* v. *Chicago*, 99 U. S. 635, 642. But upon that point we follow the Supreme Court of the State.

Decree affirmed.